

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7479

To be argued by
MERVIN ROSENMAN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

A.E. HOTCHNER,

Plaintiff-Appellee,

-against-

JOSE LUIS CASTILLO-PUCHE,

Defendant,

-and-

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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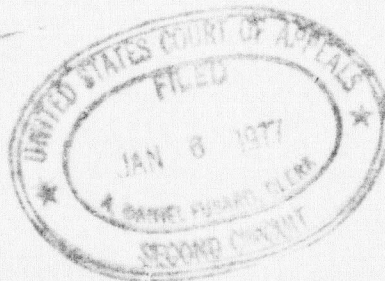


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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A.E. HOTCHNER,	:	
Plaintiff-Appellee,	:	
-against-	:	
JOSE LUIS CASTILLO-FUCHE,	:	74 Civ. 5516 (CLB) 76-7479
Defendant,	:	
-and-	:	
DOUBLEDAY & COMPANY, INC.,	:	
Defendant-Appellant.	:	

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BRIEF OF PLAINTIFF-APPELLEE

Appellee's Counter-Statement of the Case

Doubleday appeals from a \$125,002 judgment (186a)* entered after trial in the United States District Court for the Southern District of New York before Brieant, J., in which the jury returned a special verdict (which special verdict was specifically requested by Doubleday) in favor of Hotchner, for \$1 in compensatory damages on each of the two counts (libel and invasion of privacy) of the complaint, and \$125,000 in punitive damages on each count, but not cumulatively (151a). Doubleday has also appealed from the order (176a) denying its post-trial motion for judgment n.o.v. or for a new trial or to vacate or reduce the amount of punitive damages, etc., and from orders denying various pre-trial motions.

*"a" references are to the Appendix; "t" references are to pages from the Trial Record; "Exh" references are to Exhibits; "AppB" refers to appellant's brief; "AmB" to the amicus brief.

A judgment (187a) in the same amount obtained by Doubleday over against third-party defendant Ediciones Destino ("Destino"), has not been appealed. The complaint was served on the author, Jose Luis Castillo-Puche ("Puche") in Spain; he defaulted in answering and did not appear at trial; thereafter the complaint was dismissed for lack of personal jurisdiction (184a), which dismissal had not been appealed.

Appellee's Statement of Background and Facts

Because of Doubleday's one-sided "statement of background and facts", given only slightly more than one page in its brief, appellee sets forth the facts at greater length.

This action arises from the publication in 1974 by Doubleday of Hemingway in Spain (the "Book") (Exh 1, 6a), an English translation of a work originally published in the Spanish language in 1967 by Destino entitled Hemingway: Entre la vida y la muerte (the "Spanish Work") (Exh 26, 7a) written by Puche.

The major portion of the Book, and substantially all of the portions in which Hotchner is mentioned, purports to be actual reportage of events at the seven-day bull-fight festival in Pamplona, Spain, in July of 1959 involving Hemingway (called "Ernesto" in the Book) and the Hemingway friends who made up his entourage. The Book presents an intimacy between Puche and Hemingway which is completely false; indeed, the evidence indicated that the entire reportage section of the Book is a fabrication. Puche "remembers" events at which he was not present, he makes up conversations and incidents which never occurred, he palms himself off as being a participant at lunches, dinners, Hemingway's 60th birthday party, and other events at which he was not present, and he makes blatantly false statements about Hemingway and all of the members of the Hemingway entourage.

The essential falsity of the Book was conclusively proven at the trial not

only by the testimony of Hotchner and Hotchner's witnesses and unequivocal documentary evidence, but also on the cross-examination of Hemingway's widow and daughter-in-law, witnesses called by Doubleday. That evidence led the Court below in denying Doubleday's motion to dismiss at the close of the plaintiff's case, to state:

"I must say that some of this evidence would warrant a conclusion that this book is a total fake" (342a),

and, in the course of Doubleday's case to say to counsel:

"There is sufficient evidence in this record already to lead me to regard Puche as a liar . . . " (592t).

Hotchner is a professional author, playwright, and writer of television and motion picture scripts. He became a friend of Ernest Hemingway in 1948 and remained his closest friend until Hemingway's death in 1961; he also was a close friend of Hemingway's wife, Mary, until 1965. He spent a good deal of time with the Hemingways in Europe, and at their homes in Cuba, Idaho, and New York City (93-107a). Hotchner wrote the highly successful Papa Hemingway (Exh 28, 7a), an extremely intimate memoir of their friendship.

Papa Hemingway, published by Random House in 1965, sold about 130,000 copies in hardcover and approximately 500,000 copies in paperback, was published in translation in 18 different foreign countries and was a Book-of-the-Month Club selection. Hotchner is the author of another best-seller, Doris Day: Her Story, and the author of two novels, two other books, seven original television plays, adaptations for television of nine Hemingway works, several motion picture scripts and over 180 articles and short stories in magazines such as Esquire, Saturday Evening Post, Look and Life. Stipulation of Uncontroverted Facts (191a). He has given approximately 50 paid lectures based upon Papa Hemingway. (194a).

The Amended Complaint (12a) alleged 18 defamatory references to Hotchner in the Book. In its special verdict the jury found six to be libelous, viz:

"(Hotchner) was such a toady at times that it was sickening". (Book, p. 82)

"The thing I disliked most about Hotchner was his two-faced behavior toward people who were Ernesto's (Hemingway) real friends . . . though he was very clever at hiding his true feelings, you could tell that Hotchner was really a hypocrite". (Book, p. 82)

"'Freckles' (Hotchner) was never open and aboveboard. His mild manner and his air of shy diffidence seemed to me quite a cover-up for his exploitation of Ernesto". (Book, p. 83)

"Then he (Hemingway) dropped the subject of Davis and started in on Hotchner. 'He's a little precious, but he's a very smart cookie.'

'I can see that he's very fond of you,' I replied. Then, a little while later, he'd whispered, 'I don't really trust him though'." (Book, p. 161)

"'Freckles' was in complete control of the situation, and I wasn't at all surprised that he had earned lots of money for Ernesto by signing him up with the television networks and mass-circulation American magazines, though I was quite certain Hotchner had been motivated by something other than worshipful admiration of a great writer". (Book, p. 196)

" . . . Hotchner the exploiter of his (Hemingway's) reputation". (Book, p. 318)

The innuendos pleaded were that Hotchner was not a true friend of Hemingway, but pretended to be such, exploiting Hemingway in the expectation of personal financial gain; that he urged Hemingway to writing activities inimical to Hemingway's best interests; that Hemingway despised Hotchner, did not trust him and believed that plaintiff was only motivated by the expectation of financial gain arising out of his friendship with Hemingway; and that Hotchner is a person of low moral character.

Defendant Doubleday is one of the largest book publishers in the United States. The Book was edited by Kathryn R. Medina ("Medina"), an experienced Doubleday employee who had edited between 50 and 60 books and who was at the time of trial a Senior Editor (344-5a). It was translated by Helen R. Lane ("Lane"), a qualified translator, who worked under and reported to Medina.

Although he denied Doubleday's motion for summary judgment, Judge Brileant held in his Memorandum that by reason of Hotchner's friendship with and writings about Hemingway and his works, "for purposes of this litigation, plaintiff has achieved the status of a public figure" (110a). 404 F.Supp. 1041 (1975).

The Trial

A great mass of evidence was adduced at the five-day trial as to the falsity of the statements about Hotchner, that the "non-trust relationship" between Hemingway and Hotchner portrayed in the Book was a lie, and that the Book was replete with false statements, imaginary conversations and other fabrications. Insofar as such evidence relates to Hotchner, it is set forth immediately below. There is also annexed at the end of this brief a Schedule of the Book's Other False Statements and Fabrications ("Schedule") not directly pertaining to Hotchner based upon the testimony of the witnesses produced by both sides. The very important documentary evidence obtained from Doubleday's files is quoted and discussed in appellee's Point I, infra.

Plaintiff's Witnesses:

HOTCHNER testified (270a) that he had never heard of the Spanish work until after the publication by Doubleday, had never seen Puche or been introduced to him by Hemingway or anyone else (273a, 299a), that he did not recognize Puche from Picture 11 after p. 152 of the Book (181t), that Pamplona during the festival was like New Year's Eve in Times Square or a Mardi Gras (275a), that there was a milling crowd of hundreds of journalists, students and other people surrounding the table of Hemingway at the Bar Choko and that lots of them spoke to Hemingway, took his picture, got autographs, but almost none were introduced by Hemingway to him (299a). He testified that, contrary to the intimacy related in the Book, Puche had no meal--breakfast, lunch or dinner--with Hemingway in his presence in Pamplona or elsewhere (299-300a) and that he (Hotchner) was

with Hemingway substantially all the time in Pamplona (209t). Also, that since he did not speak or understand Spanish (293-4a), even if Puche had been present, he could never have had a conversation in "halting Spanish" with Puche or understood or had any reaction to any conversation Puche had in Spanish with anyone else.*

Hotchner then testified as to his intimate friendship with Hemingway (93-107a). Exhibit 31 (235a) was introduced [extracts of letters and postcards from both Ernest and Mary Hemingway, which communications are now in the University of Virginia library (279a)]. These extracts, covering the years from 1950 through 1961 (the year of Hemingway's death), begin with salutations such as "Hotch Honey", "Dearest Hotch Puss", and "Hotch Dear"; contain phrases such as "I am a true admirer of you and what's more I love you"; "you are so god-damned loyal and thoughtful", "I miss you very much", "She (Mary) says she would rather have you around than anybody". Me too", and "Its always lonesome without you". Also, just prior to Hotchner's arrival for the summer of 1959 in Pamplona and elsewhere in Spain, "wonderful to be seeing you so soon" and, after Hotchner's departure from Spain, "we miss you at everything always".

Hemingway trusted Hotchner's judgment as a close friend, accepted and followed his criticism of a manuscript of one of Hemingway's novels (123-4t), asked Hotchner to come to Cuba and help in cutting and editing the Life articles referred to herein, which plaintiff did as a friend and without compensation (280-1a). When Hemingway began to suffer from the illness which ultimately led to his suicide, Hotchner was summoned from the United States to Madrid by Bill and Annie Davis and Hemingway's secretary who were not able to get Hemingway to go home; Hotchner, in a long and arduous task, finally persuaded Hemingway to return home (102-4t). Mary Hemingway turned to Hotchner to obtain psychiatric

*That Puche could have had no conversation in any other language with Hotchner is established in Medina's letter to Doubleday's Paris office: "Puche speaks and understands no English". (Exh 4, 202a). Also see Exh 37 to the same effect.

help for Hemingway, and Hotchner thereafter retained, and was the sole consultant with, the psychiatrist in charge of his case (277a). In rebuttal Hotchner further testified on the pivotal role he was called upon to play in this illness at Mary's behest. Hotchner was the only visitor whom Hemingway wanted, and the doctors would permit, to visit him during Hemingway's two stays at the Mayo Clinic (277-8a).

Hotchner denied the truth of all of the defamatory references to him and testified that many items in the Book were total fabrications. Puche was never present at any conversation with Hotchner in Pamplona. He was first given the nickname "El Pecas" (meaning "the freckled one"), long after Pamplona and when Puche was not present (144t), so Puche's "remembering" Ordonez giving him that nickname (Book, p. 82) was a fabrication. Also a lie is the statement that he "pretended not to mind that nickname" since he did not have the nickname at that time (145t). Hotchner testified that the conversation in the Book (p. 161) in which Hemingway is quoted as saying Hotchner was "a little precious, but a very sharp cookie", and "I really don't trust him though" was totally inconsistent with their friendship and relationship (289-290a). As to the conversation (Book, p. 182) in which Hemingway is quoted as saying about Hotchner, "He's a sharp customer" and "He's also out for number one", Hotchner testified he never heard Hemingway say this kind of thing and that he would never use those words about Hotchner (164-5t).

Hotchner also testified that he had been held up to ridicule and painted in a totally false light to the editors, publishers, writers and friends with whom he associates in New York, that these people were aware of the reviews of the Book commenting on the derogatory treatment of Hotchner therein (Exh 32 and 33), poked fun at him with "toady" and the "gypsy" expressions used in the reviews, which experience he found humiliating and debilitating (306a).

Further, that he had spent a lifetime building a reputation for trust and

confidence and had written Papa Hemingway based on his long friendship with Hemingway, and that, when appearing in a radio program in Pittsburgh, a student at the University of Pittsburgh called in on the telephone and said (307a) that for a seminar on Hemingway he had read Papa Hemingway and had taken from the library the Book, and then stated "it seems that you are not that kind of a friend with Hemingway at all. He didn't even trust you so how are we to believe what is in Papa Hemingway." He was forced to defend himself on the air and felt terrible (307a). The Book is in 891 libraries (180a) and becomes a "scholastic book" read by university students, whom Hotchner cares a great deal about, but that there is no way for him to defend himself against the lies (308-9a).

Also, that for the first time in his life he could not deal with Hemingway materials because of being upset, and had been unable to work on a television adaptation of Papa Hemingway (308a). In addition, he may have lost the writing of an extremely lucrative biography of Frank Sinatra, which he was interested in writing, because of the Book (198-201t). He was also concerned about the 300 copies of the Book which went out to influential newspaper critics and magazine and television reviewers across the country (Exh 1, 195a), and the effect which the Book would have on reviews of Hotchner's future books. Since publication of the Book, he had had no significant offers to do a biography. (The Doris Day manuscript had been completed prior to the time that the Book was published (310a), and therefore had no effect on that biography). He could not tell the effect of the Book on future employment for motion pictures or television or to give lectures, since "nobody calls up and says we don't want a lecture because we read of you in this Book" or inform him that they have decided not to employ him for a motion picture because of the Book (310-1a).

GEORGE PLIMPTON, another well-known author, testified that Hemingway and Hotchner were good friends, that he had seen Hemingway and Hotchner together

numerous times (80t), that a warm relationship existed between them (74t), that Hemingway was very forthright and would express his opinion as to someone who had displeased him, and not whisper behind that person's back (75t), that the quotation from the Book where Puche says Hemingway whispered to him that Hotchner is a "sharp cuss", and then that Hotchner "is terribly intelligent, but is also out for number one" was not consistent with the relationship he remembers between Hemingway and Hotchner (76t). When read from the Purczinski translation the statement attributed to Hemingway of Hotchner, "Yes, but he's an ass-licker and dirty and somewhat treacherous. I would not sleep with him in the same room", he testified that he never heard Hemingway say anything like that, and that it was not consistent with the Hemingway-Hotchner relationship.

ANNIE DAVIS, who with her husband, "Bill" Davis, was in the Hemingway "inner circle" of intimates, testified she lived in Spain for over 20 years, and read, spoke and wrote Spanish (311a). She saw Puche and another journalist for the first time briefly in Hemingway's hotel room in Madrid the summer of 1959 but did not speak to him (312a); that thereafter she saw Puche only once in Pamplona at the Bar Choko late in the afternoon after a bullfight and spoke to him briefly (313a), that Puche was not present as a member of the Hemingway group at any of the lunches or dinners or at the picnics at the Irati River in Pamplona (314a), and she could not remember seeing Puche for the rest of the summer (315-(a)). Puche was not present at Hemingway's 60th birthday party (317a), and Puche could not have seen Hemingway shooting the cigarette from Ordenez's mouth as the Book says he did (p. 139). She further testified (272t) that Puche was not in Madrid in 1960 with Hemingway, as described in the Book nor was Mary Hemingway, who had remained in America (272-3t), contrary to the statements in the Book.

As to the alleged libels relating to Hotchner, she denied the truth of all of them (276-286t, 319-325a). She confirmed Hotchner's testimony as to when

and where he received the nickname "El Pecas", or "Freckles" (320a).

Regarding the relationship between Hemingway and Hotchner, she testified that she had met them both for the first time in 1949 (312a), that they had an extremely close relationship, were the best of friends, Hemingway often expressed his admiration for Hotchner, described him as a member of his "Socios" (Spanish word for "partners") (318a), that it was "impossible" for Hemingway to have said to Puche he didn't trust Hotchner (323a), and that based upon that trust, she, Bill and Valerie had called Hotchner to come to Madrid in 1960 and get Hemingway to go home (273t). Mary Hemingway was very excited and pleased at Hotchner's arrival in Spain, was very affectionate and loving, and trusted Hotchner absolutely (325a).

MARY SCHOONMAKER was a Ph.D candidate in Economics at Cornell University in 1959 (330a), and thereafter worked for the Alfred P. Sloan Foundation, for New York City as its Director of Courts Planning and, most recently, for the New York County District Attorney's Office as Chief of the Bureau of Planning and Operations (330a). She and her friend, Teddy Jo Paulson, had met Hemingway and his friends in the summer of 1959 on the second day of the festival in Pamplona, where as a joke they pretended to make the 2 girls "kidnap victims" (319-320t). The two girls abandoned their travel plans and joined the Hemingway entourage for the rest of the summer. They had lunches and dinners with the rest of the group and picnic at the Irati River (330a). She did not recognize Puche from the pictures in the Book (332-33a), was never introduced to Puche and never spoke to him because she spoke no Spanish (333a). "I never spoke to anyone who spoke only Spanish and I understand Puche spoke only Spanish". (337a). She remembers journalists and photographers being along on the picnic at the Irati River (333a) but never spoke to them; she never saw Puche in Pamplona during the festival (333a).

She testified that Hemingway doted on Hotchner and was the person to whom

Hemingway was closest (332a); there existed a very friendly relationship, with a lot of affection, between Hotchner and Mary Hemingway (332a), which continued after Hemingway's death since "Mary had a tremendous affection for Hotch" (340a). "Anyone who was there during that summer knew the affection he (Hemingway) had for Hotch. He talked about Hotch all the time . . . he just adored him." (335a). Hemingway called Hotchner his "copilot", said he was his "Indian brother" and described their relationship as "We are blood brothers" (336a). Hemingway loved Hotch's looks, would say "Doesn't Hotch have a wonderful face" and that "the Prado boys should have been here to paint him" (336a), meaning the artists whose paintings hung in the Prado Museum (337a). (Fallacious statements about Miss Schoonmaker in the Book including remarks about Hemingway making insulting advances to her and Miss Paulson, lewd suggestions about them attributed to Hemingway, false identification of those "kidnap victims" in a picture with Hemingway, etc. are listed in the Schedule).

JULIUS O. PURCZINSKI, an associate professor of Spanish at Hunter College, translated certain passages of the Spanish work for which no pages of the Lane translation existed, and had retranslated certain passages of the Lane translation. His testimony and the exhibit put in evidence based upon his translations are set forth in Point I, infra.

Defendant's Witnesses:

Doubleday called as witnesses three employees, KATHRYN MEDINA (the editor of the Book), WILLIAM "BILL" AUSTIN, the Assistant Contracts Manager who had called Medina's attention to the fact that the Book libeled Hotchner, saying that he doubted whether any of these "statements can be substantiated in any way" and that the treatment of Hotchner "bordered on 'malice', which together with 'reckless disregard for the truth' is a prime element in any libel action" (Exh 9, 214a), and FRANK R. HOFFMAN, a copy editor at Doubleday, who read the Book for misspellings and grammatical errors (369a), and whose report contains

no mention of Hotchner. Their testimony set forth in Appellant's brief is not repeated here.

Defendant also called as a witness SISTER YOLANDA de MOLA, a professor of Spanish at Fordham University, who testified that she had written her Ph.D thesis on the fictional work of Puche (593t). She testified she talked to Doubleday for the first time long after the publication of the Book (599-60t).

JOSE CARRASCAL testified about Puche's work as a journalist. He had never spoken to Doubleday before the publication of the Book, his first communication being four weeks before the trial (610t). He had never met Ernest Hemingway (or Hotchner or any of the other persons mentioned in the Book) (603t).

Defendant also called two witnesses, VALERIE HEMINGWAY ("Valerie") and MARY HEMINGWAY, whose testimony, as Judge Brieant commented in refusing to set aside the jury verdict, was "counterproductive" (181a).

VALERIE HEMINGWAY was 18 years old when she met Hemingway in Pamplona in 1959. On direct examination in answer to the question "Did Ernest Hemingway ever tell you he did not trust Mr. Hotchner", she said that Hemingway said he "didn't trust Jews in general" (421t), which she modified to say "He didn't trust any Jews, and it had nothing to do with Mr. Hotchner's behavior" (421t). [On cross-examination she said that Hemingway's lawyer, Alfred Rice, is Jewish, as well as Hotchner (451t)]. On cross-examination Valerie testified that Hemingway regarded Hotchner as a close friend (425t), and that she regarded Hotchner as a good friend and had a good relationship with him (421t). She added to a postcard written by the Hemingway group to Hotchner after he left Spain in 1959: "Miss you miserably. Valerie." (Exh 42, 239a). Hemingway used affectionate nicknames for both himself and Hotchner in their correspondence (435-6t), and Hemingway trusted Hotchner (438t).

On direct examination in answer to a question whether Hotchner was "sneaky", Valerie testified (416t) that he had a little tape recorder that was jokingly

called the "devil box", would, as a joke, tape people talking and then play it back before the other members of the Hemingway group. On cross-examination, she conceded that the "devil box" joke was used by Hotchner only for laughs, and not for blackmail or any evil use (430t). [On rebuttal, Hotchner testified that the recorder had been bought by Hemingway, that it was Hemingway's idea to tape conversations, and that Hemingway and all of the members of the group had great fun listening to and laughing at those recordings (628t)].

Valerie further testified that she was unable to say she ever saw Puche in Pamplona except for the photographs (428t), "Puche was the least of the things I remember of Pamplona" (429t), and she couldn't remember Puche having a single meal with the Hemingway group at any time during Pamplona (427t).

On cross-examination she testified that she had not read the Book, and that the attorneys for Doubleday had said "it was not necessary for me to read the Book" (430t). As to the statements Puche had made in the Book about her "apparent eagerness to go to bed with Ernesto" (p. 196) and about Ernesto making advances to her and to the two "kidnap victims" (p. 183), she said those statements were false (462t), and that those passages were made up by Puche (463-4t). Also, that the quotation in the Book (p. 351) of Ernest Hemingway to Puche, "She (Valerie) might like it if you tried to make out with her" sounded false to her, and "make out" is not a word Hemingway would use, "he would use a word beginning with 'F'" (466-7t).

Finally, on re-direct, she testified that prior to Hotchner publishing Papa Hemingway, she felt Hotchner was a very good and close friend of Hemingway, but that it was improper of Hotchner to write a book and a violation of their friendship, and "when something is confidential you don't publish it" (469t). However, on re-cross, she admitted that her husband, Gregory Hemingway, was about to publish an intimate book of his relationship with his father (474t), and that Mary Hemingway had written a book soon to be published about her life with Hemingway.

MARY HEMINGWAY testified on direct examination as set forth on pp. 14-15 of Appellant's brief--that the statements by Puche made about Hotchner were not unfair or inaccurate. However, on cross-examination an entirely different picture emerged. She was unable to state who the "riff-raff" surrounding Hemingway were, and would not agree with the statement in the Book (531t), did not know who was a "toady", but surmised perhaps Hotchner for drawing a caricature of Peter Buckley to be used in the shooting gallery on the Hemingway 60th birthday party (532t). [In rebuttal Hotchner testified that this was Hemingway's idea because Buckley was a friend of Mary whom Hemingway did not like (631-2t)]. She never heard Hemingway make a derogatory remark to Puche or anybody else about Hotchner (509, 534-5t), except on one occasion, citing a remark that was not derogatory. When Exhibits 48-52 (240-243a) were shown to her, she admitted that these warm letters and telegrams from her to Hotchner, all dated prior to 1965, showed affectionate warm feelings toward Hotchner, in which she shared confidences with him since he was trustworthy (542t). And finally, she confirmed that when Hemingway became mentally ill, of all his friends she turned to Hotchner for help; that he obtained Dr. Cattell to be Hemingway's chief doctor (545t), and thereafter did all of the communicating with the doctor as requested by Mary (Exh 52, 243a), and that Hotchner was the sole friend allowed to visit Hemingway during his two stays at the Mayo Clinic. She also testified, on cross-examination, that many of Puche's statements about Hemingway were false (see Schedule, Items A-F, H-I, N-P, et seq.), that Puche was not present on many occasions when he purports to be and the conversations and reportage relating thereto are fabricated (Schedule, Items J, O, CC, EE), and that conversations between Puche and herself in Madrid in 1960 could not have taken place since she was not there (Schedule, Items HH, KK).

POINT I.

THE JURY FINDINGS THAT DOUBLEDAY PUBLISHED THE LIBELOUS STATEMENTS WITH KNOWLEDGE THAT THEY WERE FALSE OR IN RECKLESS DISREGARD AS TO WHETHER THEY WERE TRUE OR FALSE MUST BE UPHELD.

A. The standard for review of the evidence on this appeal.

While this Court has stated in Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976) that "the First Amendment requires careful appellate review of the facts found at trial which have constitutional significance" (888), we respectfully submit that its "duty to 're-examine the evidentiary basis' of the lower court decision . . . in the light of the Constitution" does not nullify the general principles as many times previously stated by it, viz., that the evidence that the evidence must be viewed in the light most favorable to the appellee and that insofar as factual issues are concerned the verdict for plaintiff is entitled to the greatest weight.

The words of this Court in Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736, 743-744 (2d Cir. 1966), cert. dism. 385 U.S. 801 (1966), are still applicable to this appeal. Judge Kaufman said for the unanimous Court in upholding the verdict (including punitive damages) in that libel case:

"Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury". [citations]. When reviewing the refusal of a judge to grant a directed verdict we must view the evidence and all the inferences which reasonably flow from it most favorably to the party against whom the motion was directed. [citations] . . .

"Appellant also complains that its motion for a new trial on the ground that the verdict was against the weight of evidence, should have been granted. The granting or refusing of a new trial rests within the discretion of the trial court, and its decision will be reversed only for clear abuse of discretion. [citation] ".

In short, any additional burden of proof imposed upon plaintiff by New York Times v. Sullivan, 376 U.S. 254 (1964), and related cases have not changed

the basic rules. Thus, in Guam Federation of Teachers Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974), cert. den. 419 U.S. 872 (1974), on reviewing those cases, the Court said at 441:

"We think that in a libel case, as in other cases, the party against whom . . . a motion for a direct verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of the facts. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeals, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

"The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined is the same as in all other cases in which it is claimed that a case should not go to the jury". (emphasis by the court).

The determination as to whether Doubleday published the Book with "actual malice" required by New York Times v. Sullivan was, of course, for the jury as the finder of fact. St. Amant v. Thompson, 390 U.S. 727, 732 (1968). So, in Buckley v. Littell, supra, this Court stated at p. 896:

"[the findings were] that Littell's statement that Buckley engaged in libelous journalism was made with knowledge of its falsity or in reckless disregard of its truth or falsity, and this is a finding based in part upon credibility and demeanor which we cannot go behind."

We submit that there was more than enough evidence to support the jury verdict in favor of Hotchner.

- B. The verdict is more than adequately supported by clear and convincing proof that Doubleday published with knowledge of falsity or reckless disregard of the truth.

The snowstorm of arguments proffered by Doubleday and amicus notwithstanding, the plain and simple crux of this case is that if there was "clear and convincing" evidence that Doubleday published with "actual malice", i.e., know-

ledge that the items complained of were false or with reckless disregard as to whether they were false or not, the verdict must stand.

"Actual malice" as defined in New York Times v. Sullivan, *supra*, at 279-280, is to be distinguished from a bad or a corrupt motive or some personal spite or desire to injure the plaintiff, although of course such subjective factors may be relevant to the issue of 'actual malice'. As succinctly stated in the very recent decision of Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976; rehear. and rehear. *en banc* den. 3/5/76):

"'Actual malice' has become a term of art to provide a convenient shorthand for the New York Times standard of liability. . . . Whereas the common law standard focuses on the defendant's attitude toward the plaintiff, 'actual malice' concentrates on the defendant's attitude toward the truth or falsity of the material published. [citing Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-2, 95 S. Ct. 465, 42 L.Ed. 2d 419 (1974).]

"Whether the defendants entertained malice toward the plaintiffs is immaterial since 'actual malice' in the New York Times sense refers to the defendants' attitude toward the truth or falsity of the material published." (*ibid.*, 214).

While "'reckless disregard', it is true, cannot be fully encompassed in one infallible definition" (St. Amant v. Thompson, *supra*, 390 U.S. at 730), if defendant entertained serious doubts as to the truth of his publication, "publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice". *Ibid.*, 731.

Recklessness on the part of Doubleday may be found if there were "obvious reasons" to doubt the veracity of Puche or the accuracy of his writing. *Ibid.*, 732; Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), cert. den. 396 U.S. 1049 (1970), rehear. den. 397 U.S. 978 (1970); Carson v. Allied News Co., *supra*, 529 F.2d at 209.

If, for example, knowing that there was a high probability that Puche's statements about Hotchner might be false, Doubleday took a calculated risk and published the matter anyway, that would be an example of "reckless disre-

gard". Varnish v. Best Medium Publishing Co., 405 F.2d 608, 612 (2d Cir. 1968), cert. den. 394 U.S. 987 (1969), rehear. den. 394 U.S. 930 (1969).

There is no doubt that evidence of negligence, as well as motive and intent, may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. Goldwater v. Ginzburg, supra, 414 F.2d at 342.

As Judge Brieant said regarding that proof of liability in his Memorandum denying Doubleday's motion for judgment n.o.v. or a new trial:

"[W]e think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday." (177-8a).

1. "Actual malice" was proved by documents from Doubleday's own files and by the deposition of its own employee. _____

A year before publication, Doubleday's employees had serious doubts about the references to Hotchner in the Book. On July 13, 1973, editor Medina sent a memorandum (Exh 7, 212a) to Dick Cariello, the Manager of Doubleday's Contracts Department, enclosing eight pages (Exhs 5A-G, 203-210a) of Lane's translation relating to Hotchner, asking him for his opinion as to whether what she termed the "bitchy" and "side-swiping" matter should be left in. In addition to many of the words the jury found libelous, those eight pages contained phrases from the Spanish Work which showed Puche's bitter hatred of Hotchner. Exh 5D (206a) has Hemingway saying about Hotchner "he's dirty and a terrible ass-licker. ... I wouldn't sleep in the same room with him",* and Exh 5E (208a)

*There are two obvious inferences from this quotation, both libelous. Either Hotchner would steal his valuables or would make homosexual advances. The latter inference is intended by Puche for on p. 82 of the Book, he quotes Hemingway: "I don't trust anyone . . . I did once and the guy tried to hop in bed with me", as part of a conversation explicitly dealing with Hotchner.

quotes Hemingway saying of Hotchner "he's never done me dirt, but he's the sort of person you have to keep your eye on every minute".

The reply memorandum (Exh 9), of young William Austin, the Assistant Contracts Manager of Doubleday, who was not a lawyer, urged that these references to Hotchner be "toned down or eliminated" by Medina, and concluded:

"When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems to be an author who has worked in movies and TV, this could be a serious matter."

To make matters worse I doubt whether any of these statements can be substantiated in any way."

From reading the pages you sent, this treatment borders on 'malice', which together with 'reckless disregard for the truth', is a prime element in any libel action . . . "
(emphasis added) (214a).*

Cf. this Court's comment in Buckley v. Littell, supra, 539 F.2d at 896:

"Furthermore, Littell's publisher was very concerned about the paragraph in which the Pegler reference occurs, although not specifically about the sentence here found to be libelous; this concern should have been a red flag to Littell."

So, in Carson v. Allied News Co., supra, 529 F.2d at 211, the Court noted:

"They were also aware as publishers that the substance of the defamatory statements they were publishing made 'substantial danger to reputation apparent' [citations]."

In Rinaldi v. Village Voice, Inc., 47 A.D.2d 180, 365 N.Y.S.2d 196 (1st Dept. 1975), cert. den. 423 U.S. 833 (1975), like the case at bar, an action in libel and for invasion of privacy, it was held that when, prior to publication of the matter in suit, defendant publisher received information "from an ap-

*More than one year prior to the Austin memorandum, Medina had been put on notice by a letter from Lane (Exh 17), as to the general unreliability of Puche's Book:

"Moreover I discovered that a large number of Castillo Puche's comments about the episodes in Hemingway's novels contain gross errors of fact...Groan!...Groan! (227a) (emphasis added).

parently reliable source" that the matter was inaccurate, incomplete and in many respects totally false, an issue was presented precluding summary judgment.

Fully aware of Puche's hatred toward Hotchner, his reckless disregard for the truth, and the problems involved in this publication, Medina wrote to Puche on August 6, 1973 (Exh 11), saying:

"The third important matter which I'd like to take up with you concerns the possibility of libel to Hotchner in the book. You are certainly entitled to your opinion of Hotchner, and you may very well be right--it seems to our lawyers* that it would be a good idea if we would tone down some of your remarks about him, on the off chance that he could possibly bring suit against you. The fact that he is an American author with quite a reputation**, and also I seem to recall a professor, it's possible that he would think some of your remarks border on 'malice' (in the legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds 'damaging to his reputation and character'. It is, in my opinion, not really awfully important in terms of what you are trying to say in this book to get at Hotchner, one way or the other, very strongly. . . ." (emphasis added). (217a).

She sought to console Puche by assuring him that, even after "toning down", "I certainly won't make Hotchner look marvelous". (Ibid.) (emphasis added).

Again catering to Puche's desire to "get at Hotchner", Medina wrote to him on October 10, 1973 (Exh 13):

"I think that the reader gets the point about Hotchner, how you felt about him, and yet I think we are now safer from a legal point of view". (221a).

That Medina was continually aware of the possibility of defamation is shown by her subsequently sending to "Bill" (Austin) a memo (Exh 10), after the Book had been put into galley proofs, asking: "Hotchner libel? Gal 41, 79" (215a). [Doubleday was unable to produce these galley proofs (Exh 39, 236a)].

*[The statement attributed to "our lawyers" was a Medina fabrication for no lawyer saw the Book prior to publication] (253t). The fact that, despite the serious doubts of Medina and Austin, legal counsel was never consulted is certainly evidence of recklessness under the circumstances.

**Recognition of Hotchner's prominence and nevertheless not checking into the facts is further evidence of recklessness.

Medina did all the abortive "toning-down" of references to Hotchner without help except from Austin (252t); no one at Doubleday other than a copy editor read the entire translation (251t); Medina never asked Puche why he had written as he did about Hotchner in the Spanish Work (253t), nor even mentioned Hotchner to Lane (197a); neither Medina nor any of the other people at Doubleday, such as Messrs. Cariello or Austin, read Papa Hemingway, much less compared it to either the translation or the galleys of the Book (257t); there was no consideration given by Medina or Doubleday of sending translations or galley proofs to any of the people mentioned by Puche as being friends and associates of Hemingway (255t); and no consideration given to showing the translation or galleys to Hotchner (256t), even though Medina rather "two-facedly" wrote to Hotchner on March 13, 1973 (Exh 22), requesting him since he "wrote such a wonderful book about Hemingway", to help in getting for Doubleday copies of the three Hemingway articles entitled "The Dangerous Summer" in Life Magazine (the "Life Articles") (229a).*

More than four years elapsed between the time Doubleday acquired the English rights to Puche's book [with an indemnification clause from the Spanish publishers (Exh 2, 201a)] to the time the Book was published here. Obviously the more time to investigate, the more the possibility of liability where defendant failed to properly do so. Thus this Court said in Goldwater v. Ginzburg, supra, 414 F.2d at 339:

"The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of shipshod and sketchy investigation techniques; . . ."

*Presumably she read the Life Articles which again would have put her on notice of the high regard in which Hemingway held Hotchner (see Exh 29 B and C). Puche quotes the Life Articles throughout the Book, and may well have obtained his information about the events in Pamplona and elsewhere in Spain that summer from them and from the Spanish edition of Hotchner's Papa Hemingway. He referred to that volume in his letter to Doubleday (Exh 12, 219a), in which he said: "I don't want him [Hotchner] to appear as a possessor of all his [Hemingway's] secrets like he make it look in his book".

Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), at p. 157:

"The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored."

See also, Carson v. Allied News Co., *supra*, 529 F.2d at 211; Vandenburg v. Newsweek, Inc., 441 F.2d 278, 380 (5th Cir. 1971), cert. den. 404 U.S. 864 (1971).

The only portion of the Book in which Puche claims to have been present with Hemingway and his entourage deals with the Festival in Pamplona in 1959. Published in 1974, it certainly is not "hot news".

Doubleday is, of course, bound by the actions and nonactions of its employees. The rule that a principal is bound by knowledge of his agent as to all matters within the scope of agency, applies as well to material facts which the agent would have discovered had [s] he inquired, i.e., what [s] he should have known. Bennett v. Buchan, 76 N.Y. 386, 390-391 (1879); Farr v. Newman, 18 A.D.2d 54, 58-59, 238 N.Y.S.2d 204, 208-209 (4th Dept. 1963), *affd.* 14 N.Y. 2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964).

Directly in point is the following quotation from the leading case of Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 71-72, 126 N.E. 260, 265 (1920):

"Howland was defendant's literary editor and chief manuscript reader at Indianapolis, intimately familiar with the manuscript and in intimate correspondence with the author. What he knew, or should have known, of Howard's purpose was the knowledge of defendant. Although he was not authorized to accept a malicious libel for publication, if he did so in the course of his employment, intentionally or without proper inquiry, defendant is fully liable for his act. (Citizens Life Ass. Co. v. Brown, 1904, A.C. 432). He made no investigation or inquiry about the motive of the Corrigan chapter, although he had it in his possession and had been over every page several times before accepting it for publication. The tone and style of the libel were vituperative in the extreme . . . Howland was indifferent as to that. The jury might be permitted to say that he was negligent and reckless in not at least seeking from Howard some information as to whether the author's diatribes were intended as mere generalizations or as offensive personalities, and, if the latter, whether they were fair criticism or malicious falsehood. (Crane v. Bennett, 117 N.Y. 106, 114, 115) . . . [T]he varnish of fiction was not so opaque as to conceal from the experienced manuscript reader the possibility that Howard was using bad language and abuse about a magistrate in Jefferson

Market Court with more feeling than an author's license permitted. It may not be the duty of the publisher to check up all the author's villians to free himself from the imputation of malice, but the jury may say that Howland, the second father of the book, should, from the nature of things, have been on his guard in a case like this". (emphasis added).

2. The knowledge of Lane, acquired while acting as Doubleday's agent, was imputable to Doubleday.

In addition to the foregoing documentary evidence and admissions, plaintiff introduced further evidence from which the jury could infer Doubleday's knowledge of Puche's hatred of Hotchner by imputation through its agent Helen Lane who translated the Book from the published Spanish edition.

Professor Purczinski testified at the trial (259-268a) and his translations in a comparative table with the Lane translation (where available) and the Book were put in evidence (Exh 30, 230a et seq.). That evidence shows there were even more vicious attacks on Hotchner contained in the Spanish work. Exh 30 reveals Puche saying of Hotchner: "his role of shit-licker of the old colossus was so ostentatious that it almost made you want to vomit" (230a), "that his [Hotchner's] gaze which was a cross between a voluptuous cornered animal, a lynx with a 'quinqui' (Spanish slang for hold-up man)" (233a), "what he [Hotchner] looked most like was the leader of one of the New York or Chicago gangs" (233a), and "Hotchner, with his mocking face of the congenial gutter-rat" (234a)*.

Obviously, in translating the Puche book from Spanish to English, Helen Lane acquired knowledge of that hatred, and, as said in Judge Brieant's Memorandum, that "knowledge the jury could reasonably impute to Doubleday". (178a).

*Cf. those scurrilous descriptions with Hemingway's reference to Hotchner's "rugged honest face" in the Life Articles (Exh 29-C).

Doubleday was bound by that knowledge even if Lane had not told Medina what specific words she had modified or boilerized: "It is well-settled that the principal is bound by notice of or knowledge of his agent in all matters within the scope of his agency although in fact the information may never have actually been communicated to the principal". Scientific Holding Co. v. Plessy, 510 F.2d 15, 26 (2d Cir. 1974), citing inter alia, Farr v. Newman, 14 N.Y.2d 183, 187, 250 N.Y.S.2d 272, 275, 199 N.E.2d 369 (1964); Hurley v. John Hancock Mut. Life Ins. Co., 247 App.Div. 547, 288 N.Y.S. 199, 102 (4th Dept. 1936).

The fact that Mrs. Lane was not on Doubleday's payroll as a regular employee is, of course, immaterial. An independent contractor may be an agent, e.g., Petition of United States, 367 F.2d 505 (3rd Cir. 1966), cert. den. 386 U.S. 932 (1967), rehear. den. ibid. 1000(1967); Ackert v. Ausman, 29 Misc2d 962, 218 N.Y.S.2d 822 (S.Ct. N.Y. Cnty. 1961), affd. 20 A.D.2d 850, 247 N.Y.S. 2d 999 (1st Dept. 1964).

"One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor".
Restatement of Agency 2d, §14N.

As said in Hoffman & Morton Co. v. American Insurance Co., 35 Ill.App.2d 97, 102, 181 N.E.2d 821 (1962):

"A person may be both an independent contractor and an agent for another. Thus, an attorney at law, a broker, an auctioneer and other similar persons employed even for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors."

Even a doctor who certainly by reason of his profession must exercise independent judgment, may under the particular facts be deemed an agent. E.g., Employers Liability Assurance Corp. v. Bell, 63 F.2d 953 (3rd Cir. 1933); O'Donnell v. Pennsylvania RR Co., 122 F.Supp. 899 (S.D.N.Y. 1954).

In determining whether the particular relationship was that of agency or independent contractor, "Each case must be decided on its particular facts and

ordinarily no one feature of the relationship is determinative". Cimorelli v. New York Central RR Co., 148 F.2d 575, 577 (6th Cir. 1945). The fact of actual interference or exercise of control by the principal is not material. If the existence of the right or authority to interfere or control appears, the contractor cannot be deemed independent. Ibid., p. 578; Sharpe v. Bradley Lumber Co., 446 F.2d 152 (4th Cir. 1971), cert. den. 405 U.S. 919 (1972).

In the case at bar there was substantial evidence indicating that Lane was actively working with Doubleday editor Medina and subject to her control, friendly as their association was:

Exh 16: letter November 2, 1971, Lane to Medina:

"We seem to be in perfect agreement on what needs to be done and I gratefully accept all your improvements . . . May I correct accordingly when I find such discrepancies?" (226a).

Exh 17: letter April 25, 1972, Lane to Medina:

"After you have read this section, might we meet to discuss whether more or less extensive cuts can't be made in the rest of the book. . . . Could you spare a few minutes mayhap to consort with me". (emphasis by Lane) (227a).

Exh 18: letter March 12, 1973, Medina to Lane;

" . . . why don't you make your recommendations of how we might edit around them as you suggest in your letter we might have to do".

Exh 19: letter March 21, 1973, Lane to Medina:

" . . . I shall follow your suggestion. . . . What do you suggest that I write him (Puche) in this regard?"

Stipulation (as to testimony of Lane were she to testify at trial):

"I did, however, agree with Kate Medina, the Doubleday editor with whom I worked, that I should make changes and cuts in the translation . . ." (197a).

The question of agency as against independent contractor is ordinarily one for the jury to determine (Employers Liability Assurance Corp. v. Bell, supra), although when the evidence of agency is very strong it can be deter-

mined as a matter of law (O'Donnell v. Pennsylvania RR Co., supra).*

3. Appellant and amicus do not and cannot counter the foregoing decisive evidence.

Slurring over or ignoring the devastating documentary evidence and the portions of the deposition of its own employee (Medina) introduced into evidence by Hotchner, Doubleday pushes a series of niggling little arguments such as (AppB 10) that "Hotchner called no witnesses to testify as to any doubts expressed by Doubleday" [Doubleday's own documents establish that!], and that "None of his witnesses even claimed that Doubleday should have known that any of the statements about Hotchner were false" (emphasis by Doubleday). [Plaintiff's witnesses testified as to fact--not argumentatively as to what Doubleday should have known--that was for the jury to determine, which it did].

Similarly, the elaborate arguments of both Doubleday and amicus that Doubleday (a) obtained favorable general reports on the Spanish book prior to accepting it for translation and publication in English, i.e., before Medina and Austin thought the matter might be libelous, and (b) subsequently made changes "toning down" or eliminating other objectionable passages are utterly specious. The mere assertion by a defendant that it believed the matter published to be true does not insure against liability; likewise, a mere denial by defendant that it did not bear plaintiff personal ill will and published in good faith. St. Amant v. Thompson, supra, 390 U.S. at 732; Carson v. Allied News Co., supra, 529 F.2d at 213-4.

The bald and inescapable fact is that Doubleday published with "serious doubts" after acquiring knowledge of its author's bitter hatred of Hotchner, i.e., "with obvious reasons to doubt the veracity of the informant or the

* See also Judge Brieant's remarks at the Pre-Charge Conference (391a).

accuracy of his reports". (ibid.).

As for the testimony of Doubleday's employees and 14 witnesses, Mary Hemingway, Valerie Hemingway and Alfred Rice--the jury had every right to disbelieve them, particularly in view of their admissions, fencing with opposing counsel, and equivocations on the devastating cross-examinations. Indeed, this was significantly, if mildly, noted in the Trial Court's Memorandum denying Doubleday's motion for judgment n.o.v., etc. in which he said (181a):

"On several occasions its [Doubleday's] efforts to do so [hotly contest Hotchner's proof of falsity] led it to sponsor evidence or witnesses such as Valerie or Mary Hemingway which was counterproductive".

POINT II.

THE STATEMENTS FOUND TO BE DEFAMATORY ARE
NOT PRIVILEGED AS STATEMENTS OF OPINION.

Doubleday and amicus do not contend that the published matter on which liability was based are not libelous per se under New York common law, nor could they validly assert that. However, Doubleday claims the privilege of "fair comment", an argument which we submit is not supported by the facts or applicable law.

The law of New York has long been that courts will not strain to interpret commentary in its mildest and most inoffensive sense. Mencher v. Chesley, 297 N.Y. 94, 99, 75 N.E.2d 257, 259 (1974). Furthermore, if there is any reasonable basis on which libel can be predicated, it is the jury's function to determine the "sense in which the words were likely to be understood by the ordinary and average reader". Ibid., 297 N.Y. at 100. Also, the decision is to be upon the "whole apparent scope and intent" of the libelous material, rather than on the basis of isolated or detached individual sentences or statements. November v. Time, Inc., 13 N.Y.2d 175, 178, 244 N.Y.S.2d 309, 311, 194 N.E.2d 126, 128 (1963).

New York Times Co. v. Sullivan, supra, and the many Supreme Court cases following it have, of course, wrought substantial changes in the law of defamation, in the encouragement of "honest expression of opinion". However, as said by the Supreme Court in Gertz v. Robert Welch Inc., 418 U.S. 323 (1974) at pp. 339-40:

"But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues".

While the boundary line between fact and opinion is not always clear, the law is definite that:

"The so-called privilege of fair comment is conditional and may be vitiated by proof of actual malice, i.e., knowing falsity or reckless disregard". Curtis Publishing Co. v. Butts, supra, 388 U.S. at fn. 152.

Thus, subject to the New York Times standard, the long-established law of New York regarding "fair comment" stands as stated in Stillman v. Ford, 22 N.Y. 2d 48, 53, 238 N.E.2d 304 (1968):

"The privilege thus granted, as the qualifying term itself indicates, is not absolute; it may be overcome and defeated by a showing based on evidentiary facts that the defamatory statements were motivated by either 'actual malice' [citation], 'actual ill-will' [citation], or 'personal spite . . . or culpable recklessness or negligence.' [citation]

An otherwise qualified communication may be so extravagant in its denunciations or so vituperative in its character as to justify an inference of malice (Ashcroft v. Hammond, 197 N.Y. 488, 496, 90 N.E. 1117), or be couched in such venomous language and so plainly exhibit hatred as to warrant an inference of actual ill-will or be so grossly negligent and careless as to indicate a wanton disregard for the rights of others (Pecue v. Collins, 204 App.Div. 142, 146 (3rd Dept., 1923); Tim v. Hawes, 97 Misc. 30 (App.T., 1st Dept., 1916).

Personal attacks on the character of a person are not fair comment (Cheatham v. Wehle, 5 N.Y.2d 585, 591, 186 N.Y.S.2d 606, 159 N.E.2d 166, 169

(1959), and no comment or criticism, otherwise libelous, is fair, even on a matter of public interest, if it be made through ill-will or actual malice. Hoepfner v. Dunkirk Printing Co., 254 N.Y. 95, 106, 172 N.E. 139, 142 (1930).

It has been clearly established in Point I supra, that the findings that the six libelous statements were published with "actual malice", i.e., with knowledge that they were false or in reckless disregard as to whether they were true or false. That libelous matter which Doubleday and amicus assert in their briefs is mere "opinion" includes, inter alia, charges that Hotchner was: "such a toady at times that it was sickening", guilty of "two-faced behavior" to Hemingway's "real friends" and "was really a hypocrite", a troublemaker seeking to make an "imaginary" duel a "real one", an "expert in grinding out publicity", "never open and aboveboard", a ridiculous figure" and the "exploiter of his [Hemingway's] reputation" who "hung around Ernesto every minute".*

Such defamations are certainly not an exposition of topics of "enormous public interest" such as "democracy against totalitarianism and about the continuation of the freedom of religious worship" referred to in Buckley v. Littell, supra, 539 F.2d at 889. They patently are a vicious personal attack on the man who is widely known as Hemingway's trusted confidante and advisor and his most intimate friend. That malicious matter is obviously far beyond any privilege, and presents a far stronger case than that of the plaintiff in Buckley v. Littell, supra, in which this Court said at p. 896-897:

"In short, whatever might be said of a person's political views, any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is 'crucial' to such a person's career that he or she not be so treated."

*The purported direct quotation that Hemingway said (a) Hotchner was "a little precious" and (b) "I don't really trust him" is, of course, a direct misrepresentation of fact, and appellant and amicus do not claim the privilege of fair comment as to that.

POINT III.

THE COURT BELOW CORRECTLY REFUSED TO DISMISS
THE INVASION OF PRIVACY CAUSE OF ACTION.

Doubleday's Point III is an attack on plaintiff's Second Cause of Action, i.e., violation of his rights of privacy.

The Trial Court held in its order of February 7, 1975, denying defendant's motion to dismiss the second cause of action:

"While defendants' book is not about Hotchner, if, as alleged, 'knowing and reckless falsehoods' were published with respect to him, it may be actionable under §51 of the New York Civil Rights Law. See Time, Inc. v. Hill, 385 U.S. 374 (1967) as explained in Cantrell v. Forest City Pub. Co., ____ U.S. ____. U.S.L.W. 4079-80 (1974)". (28a).

Judge Brieant was, of course, correct then and subsequently.

In the Cantrell case, 419 U.S. 245 (1974), the Court after saying:

"Publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric". (fn. 248),

went on to say (at 249):

"In Time, Inc. v. Hill, 385 U.S. 374, the Court considered a similar false-light, invasion-of-privacy action. The New York Court of Appeals had interpreted New York's Civil Rights Law, §§50-51 to give a 'newsworthy person' a right of action when his or her name, picture, or portrait was subject of a 'fictitious' report or article". (emphasis added),

but "the constitutional protections for speech and press" precluded the application of the New York statute to allow recovery in Hill 'in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.' 385 U.S. at 388." (emphasis added).

First Amendment values do not afford an unbridled right to completely override actions for invasions of privacy. Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. den. 5/24/76, ____ U.S. ____, 96 S.Ct. 2215 (1976).

And where the evidence measures up to the New York Times standard, the case is one for the jury to decide on the basis of community mores (ibid., 1130). *

Thus, the constitutional guarantees of freedom of speech do not preclude recovery under Section 51 of the Civil Rights Law where publication is made with knowledge of its falsity or in reckless disregard of the truth. Doubleday argues (AppB 30) that Hotchner's claim for invasion of privacy must fall within the express terms of the New York statute (Civil Rights Law, Sec. 50-51), claiming that "the common law of New York recognizes no right of privacy". Counsel has apparently overlooked the words of Mr. Justice Brennan in Time, Inc. v. Hill, 385 U.S. 374 (1967):

"The text of the statute appears to proscribe only conduct of the kind involved in Robertson, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent. . . .

The New York courts, have, however, construed the statute to operate much more broadly." (381). **

Continuing his comments on the New York statute, Mr. Justice Brennan said in Time, Inc. v. Hill, supra, at 384-85:

"But although the New York statute affords little protection to the 'privacy' of a newsworthy person, 'whether he be such by choice or involuntarily', the statute gives him a right to action when his name, picture or portrait is the subject of a 'fictitious' report or article. Spahn points up the distinction".

*On remand, the suit was dismissed on the basis of "newsworthiness", the District Court stating that it was not "in any way endorsing no-holds-barred rummaging by the media through the private lives of persons engaged in activities of public interest". New York Times, 1/4/77, p. 12. Unlike Hotchner, the accuracy of the incidents appearing in the Virgil article was never disputed. ibid.

**Indeed, it was recently pointed out in Roe v. Doe, 42 A.D.2d 559, 345 N.Y.S.2d 560, 562 (1st Dept. 1973); affd. 33 N.Y.2d 902, 352 N.Y.S.2d 626, 307 N.E.2d 323 (1973), that there is an "expanding recognition of invasion of privacy actions" (cf. Griswold v. Connecticut, 381 U.S. 479; Roe v. Wade, 410 U.S. 113; Nader v. General Motors Corp., 25 N.Y.2d 560), and such actions exist irrespective of the limiting provisions of the Civil Rights Law. The underlying premise of Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), that absent the statute no actionable right of privacy exists, "has been eroded". Wojtowicz v. Delacorte Press, N.Y.L.J. 8/26/76, p. 6, col. 1 (Sup.Ct., N.Y.Cnty. Stecher, J.).

"In the 'right of privacy' cases, the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage. . . . Moreover, as Spahn illustrates, the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery".*

In the case at bar Hotchner was aggrieved not because of the use of his name, but because it was used in conjunction with false, malicious and fictitious narratives and conversations purporting to be true. In unanimously reaffirming the judgment in favor of plaintiff Spahn, the Court of Appeals noted in its second decision, Spahn v. Julian Messner, Inc., 21 N.Y.2d 124 (1967), app. dism. 393 U.S. 1046 (1969) at p. 127:

"The Trial Judge found gross errors of fact and 'all pervasive distortions, inaccuracies, invented dialogue and the narration of the happenings out of context'. (43 Misc. 2d 219, 230)".

The same sort of findings are specifically and impliedly contained in the jury verdict in the case at bar, and are amply supported by the record. One glaring example is that, as Medina wrote in her letter of October 1, 1970: "Castillo-Puche speaks and understands no English" (Exh 4, 202a; see also Exh 37). Inasmuch as Hotchner spoke no Spanish (293-4a), it is readily apparent that Puche's "reporting" of Hotchner's alleged remarks, activities and reactions to comments of the persons surrounding Hemingway were absolute fabrications.

For numerous other examples, see the Schedule at the end of this brief. Cf. the comments of Judge Brieant to counsel at the bench that the evidence would "warrant a conclusion that this book is a total fake" (342a) and lead

*Judge Kaufman (then sitting in the Southern District) had previously said in Garner v. Triangle Publications, 97 F.Supp. 546, 549 (S.D.N.Y. 1951):

"...the right to invade a person's privacy to disseminate public information does not extend to a fictionalized or novelized representation of a person, no matter how public a figure he or she may be. [citations]".

"...being a public figure ipso facto does not automatically destroy in toto a person's rights of privacy".

him "to regard Puche as a liar . . ." (592t). Note also that in "toning down" Puche's version of his purported conversations with Hemingway, Doubleday's Medina was "fictionalizing".

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"Where there is evidence mandating 'reasonable support' in the record' it is for the jury, not for the Court' to determine whether there was knowing or reckless falsehood". Time, Inc. v. Hill, supra, fn. 394.

Doubleday's knowledge of Puche's virulent animus toward Hotchner, the deletions of some of the defamatory matter before publication after the alert by the Assistant Contracts Manager, the failure to investigate from readily available sources (see Point I, supra), make especially apposite the following additional quotation from Time, Inc. v. Hill:

"The jury might reasonably conclude from this evidence-- particularly that the New York Times article was in the story file, that the copy editor deleted 'somewhat fictionalized' after the research assistant questioned its accuracy, and that Prideaux admitted that he knew the play was 'between a little bit and moderately fictionalized'--that Life knew the falsity of, or was reckless of the truth, in stating in the article that 'the story re-enacted' the Hill family's experience". (393-394).

In the case at bar, the jury was properly instructed, inter alia, that for liability to be found on the second cause of action, plaintiff was required to establish by "clear and convincing proof" that Doubleday published 'Hemingway in Spain' with knowledge or reckless disregard." (449a). The court also charged that "minor mistakes or inaccuracies" would not be sufficient to impress liability; the jury must find that "the inaccuracies must be such as to convince you that the account of Hotchner is substantially false". (448a).*

*As for Doubleday's contention that plaintiff's name was used "seventeen times on approximately only fifteen pages of the book" (AppB 34); the derogatory mentions of Hotchner were substantial enough to attract Newsweek Magazine, with its multi-million circulation (195a) which publication noted in its review of the Book that Puche "despised" Hotchner (Exh 32). One unauthorized photograph in a magazine of over a hundred pages is enough to impose liability. Grant v. Esquire, Inc., 367 F.Supp. 876, (S.D.N.Y. 1973). Doubleday also seems to ignore the well-established law that, subject to constitutional limitations, "Book publication is a trade like any other" insofar as the Civil Rights Law is concerned [opinion of Breitel, J. in Spahn v. Julian Messner, Inc., 23 A.D.2d 216, 221, 260 N.Y.S.2d 451, 456 (1st Dept. 1965)].

In Varnish v. Best Medium Publishing Co., supra, 405 F.2d at 612-613, rejecting arguments similar to those urged by Doubleday herein (including the Spahn and Koussevitsky cases), LUMBARD, Ch.J. said:

"The district court here, however, specifically instructed the jury to ignore minor inaccuracies and required them to find 'substantial falsity'. In the light of the evidence outlined above and the unobjectionable instructions, we believe that the jury was entitled to accept plaintiff's views that the article as a whole presented a substantially false and distorted picture of him and his relationship with his wife. . . .

Were we to hold, as the appellant urges, that on this record the plaintiff was not entitled to recovery, there would be insufficient restraint on reckless, irresponsible and untruthful journalism under the guise of freedom of the press."

Upon the jury finding knowing falsity or reckless disregard of the truth, it was, of course, entitled to award punitive damages to Hotchner as well as compensatory damages. Varnish v. Best Medium Publishing Co., supra; Grant v. Esquire, Inc., supra, 367 F.Supp. at 881. See also Point V infra.

POINT IV.

NO PREJUDICIAL ERROR WAS COMMITTED IN THE CONDUCT OF THE TRIAL.

The "prejudicial errors" claimed in appellant's brief (34-40) were neither error nor prejudicial:

A. The admission of the Purczinski translation was proper.

Appellant (AppB 35) makes much of the fact that Prof. Purczinski's translation (Exh 30; 230-234a) was prepared one week before trial, but omits to state that almost a year before trial it had knowledge that a prior expert retained by Hotchner (Sydney Oppenheim) had similarly translated the same passages [that translation was included in appellee's papers in opposition to the motion for summary judgment (86-87a)]. Because of Oppenheim's inability to testify at the trial, Prof. Purczinski retranslated the passages and appeared as a witness.

The issue, of course, is not whether Doubleday had seen the Purczinski translation prior to publication of the Book, but whether or not the words in the original Spanish Work as read by Doubleday's agent Lane put Doubleday on notice of the hatred of Puche toward Hotchner and was therefore evidence bearing on Doubleday's publishing with reckless disregard. (Point I, B(2), supra).

This is the simple sound point which Doubleday now calls "tortured reasoning", "illogical" and "legally untenable" (AppB 35), although it conceded in its Memorandum on its motion for judgment n.o.v. that the original Lane translation* was properly received in evidence "to the extent that it showed the toning-down action that Doubleday took with regard to the statements about Hotchner" (AppB 33).

According to Prof. Purczinski's translation and testimony, the Spanish Work, inter alia, called Hotchner a "shit-licker", referred to his "half-pimpish, half-exploitive pursuit of the master", called him "treacherous" and an "ass-licker" and looking like "a leader of a New York or Chicago gang" with a "mocking face of the congenial gutter-rat".

Translator Lane's knowledge of Puche's hatred of Hotchner acquired upon reading such highly offensive matter, was imputed to Doubleday, even if she actually did not include those vicious statements in the missing pages of her translation. Also, it was incumbent upon editor Medina (if the missing pages of the Lane translation did not contain the above-quoted language)** to inquire of Lane whether, in view of the references to Hotchner which were contained in the eight pages which had caused her to raise the question of libel with her Contracts Department, to ask whether there were any other references in the Spanish Work to Hotchner which were likewise as vicious--if she had, she

*It is to be noted that only eight pages of the Lane translation remained in Doubleday's files (Exh 5A-G, 203-10a), and none in Lane's (196a).

**If the missing pages of Lane did contain the above-quoted language, Doubleday cannot object since Purczinski supplied those missing pages.

would have learned that many even more hate-filled anti-Hotchner statements had been deleted by Lane.

Certainly Doubleday's argument that the Pulczynski translation was irrelevant is patently makeweight. Nor is there any merit to Doubleday's contention that the jury could have been prejudiced or confused thereby. The judge's charge (426-7a) clearly instructed the jury to receive it only for the limited purpose to determine whether Doubleday published with reckless disregard of the truth or falsity of the statements contained in the Book, insofar as it showed what Mrs. Lane knew from her reading of the Spanish Work and to demonstrate what the missing pages of the Lane translation might have revealed to Doubleday. The special verdict returned by the jury evinces a very careful analysis in the answering of the many questions required therein.*

B. The admission of testimony concerning other false statements and fictitious conversations and incidents in the Book was proper.

There was testimony elicited on both direct and cross-examination by Hotchner's attorney relating to passages in the Book that did not refer to Hotchner either by name or implication. They were offered and admitted to show that Puche had made up conversations and incidents which never occurred--that the Book was so patently a total fabrication that any investigation by Doubleday would have disclosed the falsity of the statements about Hotchner. There is set forth throughout this brief, and compiled in the Schedule at the end hereof, substantially more than 50 such instances. Puche describes visits to and conversations with Hemingway at the Prado Museum in Madrid--Mary Hemingway testified Puche was never with Hemingway at the Prado (Schedule,

*In Goldwater v. Ginzburg, supra, 414 F.2d at 341, rejecting defendant-appellant's claim that Judge Tyler's charge to the jury "confused rather than clarified the issues", on reading the complete charge and the record this Court stated that the jury's conduct reflected its "awareness of the difficult and delicate issues posed by the case".

Item CC); he describes "vulgar and vicious talk, all over Spain and elsewhere" about a homosexual relationship between Hemingway and his matador friend, Ordonez, which Mary Hemingway testified was untrue (Schedule, Item H); he has conversations with Mary Schoonmaker and Hotchner in their "hesitant, faulty Spanish"--neither Hotchner nor Schoonmaker speak any Spanish and denied ever being introduced to or speaking to Puche (Schedule, Items M, Q, BB); he had conversations with Mary Hemingway on Ernest's last trip to Spain in 1960--she testified she did not go to Spain with Hemingway in 1960 (Schedule, Item KK); he described Ernest being greeted with insulting remarks and gibes in various places--Mary Hemingway testified Puche was not present in those places and there were no insults and gibes (Schedule, Item CC). These are not, as Doubleday contends, mere "minor factual inaccuracies" such as Hemingway's dislike of the telephone or Mary Hemingway's "broken leg". They are downright falsehoods and fabrications, qualifying Puche to be called "Clifford Irving Puche". As such they are highly relevant evidence.

Doubleday indicates that had the numerous factual inaccuracies in the book been called to Doubleday's attention or had there been a showing that "Doubleday was aware of them or even should have been aware of them", the jury may have been entitled to infer "reckless disregard of the truth on the part of Doubleday either with respect to the Book in general or more particularly, the statements about Hotchner" (AppB 37). With the record in this case, it is incomprehensible that Doubleday nevertheless maintains that "Hotchner offered no evidence that Doubleday knew or should have known about the inaccuracies". See Point I, B, supra.

- C. The Court correctly refused to allow Doubleday to inquire into events subsequent to 1960.

The record is clear that there existed the most intimate relationship

between Hotchner and Ernest Hemingway from 1948 until Hemingway's death in 1961. The same was true as to Hotchner's relationship with Mary Hemingway, which continued, even after her husband's death, until 1965. From the extracts of the warm and affectionate letters and other communications from both Ernest and Mary Hemingway to plaintiff (Exh 31, 235a), from the testimony of all of the witnesses, both those of Hotchner and those of Doubleday, it must be clear to this Court, as it was to the jury, that there was no blemish on that warmest of friendships.

In 1965 Mary Hemingway turned on Hotchner and unsuccessfully sought to suppress history by enjoining his publication of Papa Hemingway, with its frank but true discussion of Hemingway's last illness and suicide (Exh 28, Part Four). The trial court properly refused to allow Mary Hemingway and her attorney, Alfred Rice, to retry that 1965 lawsuit.

D. The Court's charge contained no prejudicial error.

1. In this quibbling point appellant argues that Judge Brieant's introduction of the "clear and convincing evidence" standard as to "reckless disregard" of Doubleday was in error by his stating it "differs slightly from the burden of proof that applies in the ordinary civil case" (AppB 39). Appellant has plucked this single phrase from context. That quotation was preceded in the charge by:

"In this type of case the burden of proof and the standards by which you measure the sufficiency of the proof are somewhat unusual" (420a)

and continued, after the quotation in the Doubleday brief:

"However, in a case of this nature there will be an element in the case to which the plaintiff bears a heavier burden of proof, less than that of a criminal case, but greater than that of an ordinary civil case . . ." (421a).

Again:

"... There is an element in a libel case and in an invasion of privacy case that must be proven by a higher standard of proof and this element is that the defendant, that is, Doubleday, published the statements complained of knowing that they were false or in reckless disregard of whether they are true or false. As to this element, the proof must be clear and convincing". (423a).

And "clear and convincing" was further defined as "the testimony be clear, direct, weighty and convincing so as to enable you to come to a clear conviction or conclusion without hesitation as to the truth of the precise facts" (423a).

Clearly no prejudicial error was committed.*

"The impact of a jury instruction is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied". Curtis Publishing Co. v. Butts, supra, 388 U.S. at 156-157.

Cf. Goldwater v. Ginzburg, supra, 414 F.2d at 341, in which this Court approved the charge of Judge Tyler that "clear and convincing proof" was necessary to find that defendant acted with "actual malice" and that otherwise plaintiff's burden could be satisfied by a preponderance of the evidence.

2. Appellant claims that the Lane translation was not received to assist the jury "in determining whether Doubleday knew that the statements made were false", and that the Court's statement (426-7a) that the jury could rely on the translation to make such a finding was prejudicial (AppB 39). Again Doubleday quotes out of context. The charge immediately after Doubleday's quotation continues: "or whether Doubleday published with reckless disregard of the truth or falsity of the statements contained in 'Hemingway in Spain'" (426-7a). Plaintiff had introduced the Lane translation as part of its proof

*Indeed, Judge Brieant incorporated in his charge the very words submitted by Doubleday in its "Requests to Charge the Jury", viz., that "clear and convincing" proof is a "higher standard of proof" than "preponderance of evidence". See paragraph 7 of Document 45 in the Record on Appeal.

that Lane's notice of Puche's hatred toward Hotchner was imputed to Doubleday and therefore the jury could properly rely on the Lane translation, inter alia, to make such a finding. This statement (AppB 39) that Hotchner never contended that the statements contained in the Lane translation put Doubleday on notice of the falsity of Puche's writing is absolutely incorrect.

3. The alleged error of the Trial Court for using the word "fencing" is based upon still another incorrect assertion. Appellant says (AppB 39) that "the Court had rebuked Mrs. Hemingway for 'fencing' with Hotchner's attorney during her testimony". The Court did not rebuke Mrs. Hemingway--it rebuked plaintiff's attorney:

"Q [by Rosenman] You are fencing with me, Mrs. Hemingway.

The Court: Yes, I will sustain the objection. The jury will decide whether the witness is fencing with the attorney or not. That is an improper comment on your[Rosenman's] part. Whether she is fencing or not is for them to figure out, not for you to say. I don't want any more of that." (558t).

The Court's instruction, viz.:

"If you find that a witness has been evasive in his or her answers in court or has been fencing or arguing with an attorney asking questions of him or her, you may consider this as a reflection on the credibility of that witness." (emphasis added) (430a),

was eminently fair and impartial.

4. The contention that the Court's definition of "recklessness" was incorrect and "highly prejudicial" (AppB 39) is patently nitpicking. If the jury found Doubleday had "clear reason to suspect the truth of the statements or some of them", as the Court charged (440a), then the jury could also find Doubleday had or should have had serious doubts "about publishing without investigation". Recklessness on the part of Doubleday was established if the jury determined there were obvious reasons to doubt the veracity of Puche or the accuracy of his writing. St. Amant v. Thompson, supra, 390 U.S. at 732; Goldwater v. Ginzburg, supra, 414 F.2d at 337; Carson v. Allied News Co.,

supra, 529 F.2d at 209.

5. The assertion that there was no evidence as to Lane's agency is contrary to fact. The letters exchanged between her and Medina (Exh 16-19, 226-7a), quoted and discussed supra in Point I, B(2), clearly demonstrate substantial control of Medina over the translator.

The Trial Court in an extensive and very fair charge correctly covered the relevant issues of agency to be determined by the jury (442-444a). Furthermore, Doubleday's Requests to Charge contained no item whatsoever regarding agency, and no exception was taken by it to the Court's charge. Accordingly it cannot now claim error. FRCP Rule 51.

6. The charge as to the invasion of privacy count of the complaint was entirely correct. Again appellant has taken a single phrase out of context (AppB 40). The six pages (444-9a) of the Charge relating to the right of privacy count listed the elements plaintiff must prove (445a), including "fictionalized events . . . conversations or actions or incidents that never actually happened" (445a, 446-7a). The charge further stated that plaintiff must prove that the account of events in Spain concerning him were inaccurate and false and as to this "minor mistakes or inaccuracies would not satisfy this requirement" (448a), and that the evidence must "convince you that the account of Hotchner is substantially false" (448a) (emphasis added). See also Point III, supra.

POINT V.

PLAINTIFF'S RIGHT TO PUNITIVE DAMAGES WAS SUBSTANTIATED BY THE LAW AND THE EVIDENCE.

Both Doubleday and amicus persistently ignore or obfuscate the plain fact that under both Federal and New York law punitive damages may be awarded to a plaintiff, "public figure" or not, provided that knowledge of falsity or reckless disregard for the truth on the part of defendant is found.

It is now firmly established that, Gertz notwithstanding, where "actual malice" as defined in New York Times v. Sullivan is shown, punitive damages are overable in libel cases where the applicable state law permits same.

Buckley v. Littell, supra, 539 F.2d at 897; Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029-30 (4th Cir. 1976); Carson v. Allied News Co., supra, 529 F.2d at 214; Davis v. Schuchat, 510 F.2d 731, 737-738 (D.C. Cir. 1975).

Nevertheless, Doubleday and amicus go so far as to contend that punitive damages are or should be absolutely prohibited in libel cases. The court in Appleyard v. Transamerican Press, Inc., supra, 539 F.2d at 1029, expressly declined to follow the District Court decision of Maheu v. Hughes Tool Co., 384 F.Supp. 166 (C.D. Cal. 1974), relied upon by Doubleday and amicus, which it termed a "questionable holding".*

In Curtis Publishing Co. v. Butts, supra, 388 U.S. at 159-160, the Court rejected the argument that "an award of punitive damages cannot be justified constitutionally by the same degree of misconduct required to support a compensatory award" in a First Amendment case. In view of the decisive recent holdings of the four different Circuits above cited, it seems unnecessary to belabor our point that there is no constitutional bar to exemplary damages in a libel case where the evidence satisfies the New York Times standard. However, the following excerpt from Appleyard v. Transamerican Press, Inc., supra, 539 F.2d at 1029-1030, is especially relevant to the case at bar:

*The Maheu case is also criticized in 61 Va.L.Rev. 1349 (Nov. 1975) which comments at 1439-40 fn.:

"When the double negative of the Court's holding in Gertz is removed, it seems clear that punitive damages are available when actual malice is proved . . .

"It is difficult to square this conclusion[i.e., the Maheu decision] with the Supreme Court's affirmance of a punitive damages award in Butts, its acquiescence in Garrison to criminal libel prosecutions on a showing of actual malice, and its continued recognition that malicious defamatory speech is not constitutionally protected."

" . . . we do not read Gertz to hold that a public figure plaintiff may not recover punitive damages if he meets the burden of the New York Times test . . . This rationale [i.e., the purpose of the New York Times test] has little application where, as in the instant case, New York Times malice has been proven; for where such malice is present there is no good-faith attempt to point out real abuses to the public. There is only an unsubstantiated attack on the character, reputation and good name of a particular individual".

It has been the established law in New York for many years that proof of actual personal ill-will or desire to harm the plaintiff is not essential in order to obtain punitive damages in a defamation action. Thus the unanimous Court of Appeals said in Smith v. Matthews, 152 N.Y. 152, 158, 46 N.E. 164, 165 (1897):

"The learned counsel for the defendants insists that punitive damages are only recoverable in case of actual malice, when the wicked intent to injure exists. The rule is otherwise and it has been repeatedly held in this state that a libel, recklessly or carelessly published, as well as one induced by personal ill will, will support an award of punitive damages. [citing cases] ."

See also, Crane v. New York World-Telegram Corp., 308 N.Y. 470, 476, 126 N.E.2d 753, 757 (1955).

Nevertheless, appellant and amicus persist in arguing that punitive damages must be denied because there was no proof that Doubleday had "no evil motive" or "a proven intent to harm the plaintiff". (Indeed, this specious contention occupies the major part of Doubleday's Point V). In support of that contention they heavily rely on Clevenger v. Baker Voorhis & Co. (AppB 37, 43, 44; Am.B 34n). The essence of that decision was merely that plaintiff was not entitled to punitive damages because of a failure of proof as to "actual malice". Furthermore, the Appellate Division emphasized that the only basis of Clevenger's claim was that the volume contained proof-reading kind of errors most of which the Court found to be "virtually miniscule in character". This appears even from the quotation in Doubleday's brief at p. 44. On the contrary,

in the case at bar it is clear that Doubleday's reckless disregard for Hotchner's rights was more than adequately established by the evidence (Point I, supra).

Appellant's contention was decisively disposed of by this Court in Reynolds v. Pegler, 223 F.2d 429, 434 (2nd Cir. 1955), cert. den. 350 U.S. 846 (1955):

"The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights."

Doubleday's pious protestations of its lack of moral culpability notwithstanding, it cannot truthfully deny its knowledge--prior to publication--of the author's bitter animosity toward plaintiff. The record is full of incontrovertible evidence of that hatred including documents from Doubleday's own files, e.g., Exhibits 7, 9 and 11; and see Memorandum of the Court below (179a) and Point I, B, supra. The heedless publication of the defamatory material despite that prior knowledge rendered Doubleday liable for punitive damages both under New York law and the First Amendment modifications thereof. Its conduct unquestionably was so reckless as to substantiate the verdict for Hotchner; indeed, we submit it was such as to indicate an actual cooperation with the author in his intent "to get at" Hotchner.

Mr. Justice Harlan said in Curtis Publishing Co. v. Butts, supra, 388 U.S. at 161:

"Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation. . . . As we have already noted (supra, pp. 156-158), the case on punitive damages was put to the jury under instructions which satisfied the constitutional test we would apply in cases of this kind, and the evidence amply supported the jury's findings."

The case at bar is one where those words are of particular relevance.

POINT VI.

THE PUNITIVE DAMAGE VERDICT WAS NOT EXCESSIVE,
AND THE TRIAL COURT WAS CORRECT IN REFUSING TO
SET IT ASIDE.

- A. A jury award in a libel case is entitled to the greatest weight and will not be set aside by this Court unless it is so "monstrous" as to "shock the judicial conscience".

As shown supra in Points I and V, there was more than adequate evidence adduced to support the jury's finding that Doubleday was guilty of conduct justifying assessment of punitive damages. The amount of the punitive damages to be awarded was, of course, a matter for the jury to decide.

There is no rigid formula by which the amount of punitive damages is fixed--obviously it depends on the facts and circumstances of each case. But, especially in libel cases, the jury award is entitled to the greatest weight.

In upholding a jury verdict for compensatory and punitive damages in a libel case, this Court said in Hope v. Hearst Consolidated Publications, Inc., 294 F.2d 681 (2d Cir. 1961), cert. den. 368 U.S. 956 (1962), at 691:

"Although the verdict . . . is quite high, we do not think the trial court abused his broad discretion in refusing to set it aside. The award was not 'monstrous'. Dagnello v. Long Island Railroad Co., 2 Cir. 1961, 289 F.2d 797".

Five years later, again upholding a libel verdict including punitive damages, in Diapulse Corp. of America v. Birtcher Corp., supra, 362 F.2d at 744, after stating that, with respect to excessiveness, "the scope of our review is quite narrow", and quoting Judge Medina's words in the Dagnello case that:

" . . . so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand",

the unanimous court said per Kaufman, C.J.:

"And, we have indicated that we would modify a verdict only when the 'jury awards something fantastic for this sort of harm!' [citation] ". (emphasis by the Court).

Particularly applicable to the case at bar is the famous decision in Reynolds v. Pegler, 123 F.Supp. 36 (S.D.N.Y. 1954), affd. 223 F.2d 429 (2d Cir. 1955), cert. den. 350 U.S. 846 (1955). Upholding a verdict of \$1 compensatory and \$175,000 punitive damages, Judge Weinfeld held at pp. 38-39:

"Given a basis on which to award punitive damages, a jury is necessarily vested with a broad discretion. In imposing the penalty of punitive damages the jury may be said to function in a quasi-judicial capacity and just what sum will vindicate the public interest and act as a deterrent upon him who has offended rests peculiarly within the discretion of the jury as the dispensers of justice. There are, of course, limits upon the jury's power; but unless the amount of the penalty is so clearly excessive as to compel the conclusion that it is the result of passion or prejudice, its award should not be disturbed. The fact that a court may disagree with the jury's award, or had a court been sitting as the trier of the fact, it would have awarded a lesser sum, is not the test on a motion to set aside or reduce a verdict on the ground of excessiveness. The Court may not substitute its judgment for that of a jury. In general, the authorities are in accord that it is only when the amount awarded shocks the 'judicial conscience' that the Court is warranted in interfering with the award [citing cases] ". (emphasis added).

In affirming, this Court agreed that, absent passion or prejudice, "the amount of punitive damages is an issue peculiarly within the province of the jury to decide". 223 F.2d at 434.

The New York cases support the proposition that in defamation cases, more than any other tort, because of the element of wounded sensibilities and loss of public esteem, the jury is generally the "supreme arbiter" on the amount of damages. See e.g., Polakoff v. New York World Telegram Corp., 1 A.D.2d 884, 149 N.Y.S.2d 872, 873 (1st Dept. 1956), affd. 2 N.Y.2d 901, 161 N.Y.S.2d 151, 141 N.E.2d 634 (1957) (reinstating verdict of \$50,000 set aside by the trial judge who felt plaintiff was entitled to nominal damages

only), and Lynch v. New York Times Co., 171 App.Div. 399, 401, 157 N.Y.S. 392, 393 (1st Dept. 1916).

And, by their very nature, an even wider discretion is to be accorded the jury in assessing punitive damages than compensatory damages. Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672 (1919) [citing authorities, including New York cases] .

- B. The amount of punitive damages awarded by the jury in the case at bar were within the judicial guidelines, supra, and should not be disturbed.

As discussed at length supra in Point I, appellant Doubleday was admittedly on notice of co-defendant Puche's animus to plaintiff Hotchner. That a firm of Doubleday's great size, wealth and prominence (see infra) should with knowledge of the author's hatred of the plaintiff and strong doubts as to the possible libelous nature of the matter, have an inexperienced 27-year old non-lawyer in their Contracts Department determine whether or not the Book contained defamatory matter and make the incomplete deletion of such matter (Austin 273-5a, Exh 7, 211a), then (through the Editor-in-Charge) assure Puche that, even after "toning-down" some of the defamatory matter "I certainly won't make Hotchner look marvelous" (Exh 11, 217a), and then deliberately publish the Book which Newsweek Magazine, with a circulation of over 3,000,000 (Ct. Exh 1; 195a) and a readership of two to three times that number, could readily--and did--note that Puche "despises" Hotchner (Pltf. Exh 32), certainly affords substantiation of the jury's verdict herein--a finding that Doubleday recklessly and wantonly acquiesced in--indeed aided and abetted--Puche's attempt to "get at Hotchner".

A major part of the Trial Court's opinion denying Doubleday's motion for judgment n.o.v. and to set aside the verdict as excessive and on other grounds, bears on the question of the amount of damages, and the Court is respectfully

referred to that "detailed appraisal of the evidence bearing on damages." (179-181a).

In weighing the \$125,000 award to Hotchner against the \$175,000 award of punitive damages (for one newspaper column) upheld in Reynolds v. Pegler, supra, this Court will undoubtedly also take into consideration, inter alia, the facts that (a) libels in a book are of far more permanence than libel in a single newspaper article--today's newspaper is the lining for the garbage can tomorrow, whereas a book is permanent and, as noted by Judge Brieant (180a), remains not only in the ownership of individuals but also indefinitely on the shelves of university and public libraries for permanent reference by students and other readers, and (b) the lessened value of the dollar today and, by reason thereof, the far higher verdicts generally today as contrasted to 1954--thus, the 1954 Reynolds verdict today would undoubtedly have been at least \$350,000.*

In deciding whether an award of damages for personal injury should be sustained it is generally held that changes in cost of living or (in its alternative expression) purchasing power, should be taken into consideration by the courts. 12 A.L.R.2d 611, 614. Recognition of the increased cost of living or of the impaired purchasing power of money is common in sustaining personal injury awards attacked as excessive. ibid. 629. Furthermore, the change in cost of living or in the purchasing power of money is so much a matter of common knowledge that even a jury is entitled to consider it although it has not been proven in evidence. A fortiori, a court in reviewing an award for damages will take judicial notice of such change. ibid., 642-644.

*According to U.S. Bureau of Labor Statistics data, based on 1967=100 index numbers, by October 1976 the purchasing value of the dollar had decreased 53.5%. [1954 purchasing power=.01242 (\$1.24); October 1976 purchasing power=.00577 (\$0.58)]. Citing the rise in the cost of living index, the Court said in Virginian Ry. Co. v. Rose, 267 F.2d 312, 316 (4th Cir. 1959), affirming the refusal of the trial court to set aside the verdicts for excessiveness:

"It does not necessarily follow, however, that a verdict deemed excessive ten years ago must be viewed similarly today".

Referring to that A.L.R. annotation, the Court said in Virginian Ry. Co. v. Rose, supra, 267 F.2d at 316 fn.:

"Courts, federal and state, throughout the land have taken judicial notice of the diminished purchasing power of money and have held that this is a factor to be considered in making and in reviewing awards of damages. [citations]."

More recently, in Century "21" Shows v. Owens, 400 F.2d 603, 611 (8th Cir. 1968), the Court said:

"Defendants complain the verdict of \$85,000 is excessive. In determining whether a verdict is excessive, a comparison of verdicts in other cases is of limited value as each case must be evaluated according to the evidence peculiar to that case. . . . Courts in considering this issue must take into consideration the constant erosion of the purchasing power of the dollar and should not invade the province of a jury, unless the verdict is so excessive as to be out of all reason and to shock the conscience of the court."

See also Bach v. Penn Central Transportation Co., 502 F.2d 1117, 1122 (6th Cir. 1974) and cases cited.

The New York courts follow the general rule. E.g., Lucivero v. Long Island R.R. Co., 22 Misc.2d 674, 200 N.Y.S.2d 728 (S.Ct., Kings Co., 1960); Rosen v. Sterling Symphony Inc., 193 Misc. 12, 84 N.Y.S.2d 755 (City Ct., N.Y. Co., 1948); Roeder v. Erie R.R. Co., 164 N.Y.S.2d 167 (S.Ct., Westch. Co., 1917; not oth. rep.). In Burtman v. State, 188 Misc. 153, 67 N.Y.S.2d 271 (Ct.Cl. 1947), the Court said at 273:

". . . attention has been called to prior adjudications of this and other courts. While they may offer some guide in fixing the amount, this Court is indeed mindful of the sharp devaluation of the dollar between the times of the decisions of yesteryear and today. It does not require the recitation of statistics and governmental compilations to establish an acknowledged fact; that the purchasing power of the dollar has greatly diminished in recent times."

The rule is applicable to punitive as well as compensatory damages: In affirming such a verdict in Bucktrot v. Partridge, 130 Okla. 122, 265 P. 768, 770 (1928) it was said:

". . . [T] his court will take judicial notice of the fact that the purchasing power of a dollar is much less today than it was a few years ago; . . . and the tendency toward allowing much larger verdicts to stand than were permitted a few years ago."

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Attacking the trial court's justification of the award to Hotchner on the basis, inter alia, of the wealth of Doubleday, Doubleday's counsel present another misconception of the law and facts (AppB 52 fn.). Contrary to their claim that "not an iota of evidence was introduced as to Doubleday's 'wealth'", there was testimony adduced, without objection by Doubleday, that it had annual sales of \$100,000,000. and published[in the year the book was published] over 700 books per annum (197t).*

The general rule as to consideration of a defendant's wealth is set forth in 25 C.J.S. Damages §126(3) in which it is stated, inter alia:

"While there is some authority to the contrary, according to the general rule it is proper to consider defendant's wealth and pecuniary ability in fixing the amount of damages, and therefore, evidence as to defendant's wealth, financial condition and pecuniary ability is generally held admissible."

". . . and that where there is evidence of defendant's real or reputed wealth, stated in terms of property or prospects, there is a sufficient basis for an award of punitive damages since defendant may protect himself against erroneous inference by showing the actual facts".

Thus, in the recent decision of Roemer v. Retail Credit Co., 44 Cal. App.3d

*Indeed, Doubleday is described in the amicus brief (p. 2 fn.) as "one of the largest" book-publishing houses in the United States, as well as "a prominent member" of amicus. Bowker, which amicus cites as an authority (AmB., 20 fn.), attributes 734 titles to Doubleday for 1974. Literary Market Place (1975-76 Edition)p. 25. Dun & Bradstreet Inc. reported on September 24, 1975, that Doubleday's annual volume was indicated to be "in excess of \$100,000,000", and that on that date the Assistant to the Treasurer said retained earnings were "well in excess of \$29,000,000".

This Court will consider also the "responsibility which accompanies such extensive influence" of the publisher. Reynolds v. Pegler, supra, at p. 41, and cases cited.

938, 119 Cal.Rptr. 82 (1975), adhering to the holding in Wetherbee v. United Insurance Co. of America, 18 Cal.App.3d at 270-271, 95 Cal.Rptr. at 681 (1971), that "in determining the amount necessary to impose the appropriate punitive effect the jury was entitled to consider the wealth of the defendant", the appellate court upheld the award of \$250,000 punitive damages, and quoted the observation of the Supreme Court of California in Bertero v. National General Corp., 13 Cal.3d 43, 65, 529 P.2d 608, 624 (1974), that:

"It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective".

The Restatement of Torts reflects the general rule, stating in Section 908(2) that in assessing punitive damages, the trier of fact can properly consider, inter alia, the wealth of the defendant. Comment (e) of that Section elaborates:

"The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person."

The plea that Doubleday lost money on this particular Book (AppB p. 47) is an especially inconsistent argument in view of their counsel's statement that "Punitive damages are solely to deter and punish" (AppB 50). That the gross misconduct of a wealthy defendant resulted in an unprofitable venture and therefore merits exemption from punitive damages is patently illogical.

Doubleday's proposition that evidence of the financial condition of a defendant is not admissible in New York for the purpose of assisting the jury in measuring punitive damages (AppB 52n), is particularly ill-taken in view of the recent unanimous decision of Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (4th Dept. 1975) [not mentioned by Doubleday] in which the court discussed the conflicting opinions of the few earlier New York cases (all courts of ori-

ginal jurisdiction)*. Acknowledging that defendant's wealth is relevant "with respect to what should be awarded to plaintiff as punishment to defendant and to deter defendants and others of similar mind from engaging in malicious acts" (ibid., 910), the Court found (911) that:

"... an examination of the authorities in general across the nation reveals that the great majority of the states permit disclosure of a defendant's wealth in such actions, and admits such evidence at the trial". (citing cases and other authorities),

and concluded that defendant's wealth is to be considered in awarding punitive damages.**

As noted supra, the evidence regarding Doubleday's pre-eminence in the publishing field was introduced without objection by Doubleday, and of course it cannot now complain thereof. Fed.R.Evid. 103(a). Accordingly, the court below was entirely justified in considering this among many other factors in arriving at its determination that the jury verdict was not excessive.

In Buckley v. Littell, supra, 539 F.2d at 897, this Court, in reviewing the amount of punitive damages awarded by the trial judge (sitting without a jury), specifically noted that the Court below:

"had not investigated [the defendant's] financial situation other than to note his occupation, to determine the extent to which the damages awarded would be an effective deterrent" (emphasis added).

*Among the New York cases holding that defendant's financial condition is a "material consideration" in fixing the amount of exemplary damages is a Section 51 case, Klauber v. S.K.E. Operating Co., 163 Misc. 418, 295 N.Y.S. 701 (S.Ct., Onon.Co., 1937). 1 Clark "New York Law of Damages", Sec. 54, cites and quotes Fry v. Bennett, 11 Super.Ct. 241, 262; 1 Abb.Pr. 289, that

"Damages which would be exemplary when inflicted upon a person in moderate circumstances, would be trivial, and in no sense exemplary, when imposed upon a person whose property and income were very much larger."

**The Court suggested that a split-trial procedure should be used, i.e., first determining that plaintiff is entitled to punitive damages, and then have the jury consider defendant's net worth and income taxes for five preceding years. (p. 913).

Stating that as a man of the cloth and professor of religion the defendant was "subject to such a person's notoriously low salary", the Court adjusted the award "in the interests of justice".

The foregoing clearly indicates that this Court has adopted the general rule of considering a defendant's financial status in determining punitive damages. Certainly, since lack of wealth is to be considered in diminution of damages, the corollary is true. The verdict against the publishing giant in the case at bar is entirely reasonable. As said by the Court below:

"Doubleday, a prominent publisher with a full staff and active list can hardly be compared with the impecunious theologian as to whom an award was reduced in *Buckley v. Littell*, Dkt. 75-7358 (2d Cir. June 30, 1976). As smart money here, the amount is not excessive for this defendant." (180-181a).

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In further regard to *Buckley v. Littell*, it should be pointed out that in reducing the punitive damages award by the trial court, this Court took into consideration, in addition to that defendant author's poor financial status, the factors that (a) the two most important of the three defamatory statements [political comment] were held by this Court not to be libelous; (b) plaintiff Buckley had received a settlement from the publisher prior to the judgment against the author-appellant Littell (*ibid.*, p. 897); and (c) the offensive book had been voluntarily withdrawn from distribution when Buckley began his action (*ibid.*, p. 897).

The facts in the case at bar are diametrically opposite. Doubleday aggressively contested this action from its inception, at every stage of the proceedings. It unsuccessfully moved to dismiss the second cause of action; it opposed plaintiff's application to amend the complaint; it sought summary judgment and then certification to appeal the order denying same; it gratuitously

tried (without authority from the author) to attack the jurisdiction of the court over co-defendant Puche*, as well as moving after the prolonged trial for judgment n.o.v., etc.

In his Memorandum denying Doubleday's motions under Rules 50(b) and 59(a), Judge Brieant perceptively commented (181a):

"If we regard the social purpose of libel litigation as vindication, Hotchner's road to vindication was tortuous, costly and beset with travail. This is not a case like Buckley, supra, in which the publisher attempted to withdraw the offending work. Here there was no apology--indeed, instead of apologising, conceding Puche's falsity and litigating only the question of its own reckless disregard before the jury, Doubleday here hotly contested Hotchner's proof of falsity."

He also noted that the verdict "is no windfall for this plaintiff who must pay income taxes thereon as well as substantial legal fees, the full magnitude of which is not yet known". (181a). Those remarks find support in McWeeney v. N.Y. N.H.&H. R.R. Co., 282 F.2d 34, 38 (2d Cir. 1960); cert. den. 364 U.S. 870 (1960), where, in upholding the verdict, this Court en banc considered counsel fees (as well as inflation), and said, per Friendly, Cir.J.:

"... the supposedly overcompensated plaintiff does not retain his entire recovery or anything like it. Whatever the reasons of history or policy for the American practice of not awarding attorneys' fees to the successful party . . . we can hardly shut our eyes to this . . ."

While no specific evidence was offered as to counsel fees and disbursements, the jury could easily recognize the magnitude of the legal work involved, e.g., the five-day trial occupying the full time of plaintiff's two lawyers, the sixty exhibits introduced, the depositions and stipulations read into evidence, the examination of plaintiff's witnesses and devastating cross-examination of defendant's witnesses clearly showing extensive preparation by counsel; also the likelihood of an appeal.

*After that unsuccessful attempt by Doubleday attorneys, attorneys for the Spanish Consul appeared specially and had service vacated on the ground that Puche was not "doing business" within the jurisdiction.

Attorneys' fees and other expenses of litigation may be considered in awarding exemplary damages as punishment for wrongful and malicious acts, although they may not be allowed as compensatory damages in the absence of statute.

In Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966), the Court sitting en banc said at 662:

"The discretion of the jury is enhanced by the doctrine that punitive damages need not have any relation to compensatory damages. . . . Consideration of whether punitive damages are excessive naturally brings up the question of what elements may properly be taken into account in their assessment. One factor mentioned by the Supreme Court as a guide rather than a definition, is the provisions of costs of litigation actually incurred but not included within costs taxable to the ordinary victor. Day v. Woodworth, supra, 54 U.S. at 371. The significant element of course is counsel fees. Even when that amount is not proved the jury may be instructed to take probable expenses into account. [citation] ".*

It is significant that Doubleday, which cites the Afro-American case elsewhere (AppB 47), ignores it in erroneously contending (AppB 50-51) that "the court's reference to the attorneys fees incurred by Hotchner in prosecuting the action as a justification for the amount of punitive damages is without precedent in New York and against the weight of authority".

Actually, the great majority of jurisdictions do allow consideration of attorneys fees in awarding punitive (although not compensatory) damages. See 30 A.L.R.3d 1443 and cases listed there and in the annual Supplement thereto. [The sole cases cited by Doubleday reflect the minority view].

The Supreme Court said in F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974) at 129:

"We have long recognized that attorneys' fees may be awarded to a successful party where his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons".

*[The last sentence is a footnote]. See also Brewer v. Home-Stake Production Co., 200 Kan. 96, 434 P.2d 828, 831 (1967).

And notwithstanding Doubleday's assertion, unsupported by any citation, that "This, however, is clearly not the law in New York" (AppB p. 51), the only reported New York decisions indicate that attorneys' fees will be granted as part of punitive damages in a proper case. Thus in Russian Church of Our Lady of Kazan v. Dunkei, 67 Misc.2d 1032, 1061, 326 N.Y.S.2d 727, 757 (S.Ct., Nassau Co., 1971), mod. and affd. 41 App.Div.2d 746, 341 N.Y.S.2d 148 (2d Dept. 1973), affd. 33 N.Y.2d 456, 354 N.Y.S.2d 631, 310 N.E.2d 307 (1974), the Court commented:

"Expenses of litigation including attorneys' fees may be considered not as compensation but as punishment for wrongful and malicious acts (25 C.J.S. Damages §50-d)."

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The law of both this Second Circuit and New York is clear that punitive damages may be awarded without relation to the amount of compensatory damages and regardless of the fact that plaintiff may not have suffered actual injury from defendant's wrongful conduct. Appellant's argument (AppB 52-53) that punitive damages should bear some relationship to the injury inflicted is wholly without merit. Rejecting a similar contention by defendant in Reynolds v. Pegler, supra, 38, Judge Weinfeld said:

"It has long been the law of New York . . . that the jury may award substantial exemplary damages even though no financial injury has been suffered . . .

"To adopt a contrary view 'would mean that a defamer gains a measure of immunity no matter how venomous or malicious his attack simply because of the excellent reputation of the defamed; it would mean that the defamer, motivated by actual malice, becomes the beneficiary of that unassailable

*See also Diamond v. Mutual Life Ins. Co. of New York, 75 Misc.2d 443, 347 N.Y.S.2d 907 (Civ.Ct., N.Y. Co., 1973), [revd. 77 Misc.2d 528, 356 N.Y.S.2d 164 (App.T. 1, 1974) for failure to assert facts justifying punitive damages]. There is also authority that recovery of counsel fees and expenses is permitted in a malicious prosecution and false arrest case. Gorman v. Kings Merchantile Co., 36 Misc.2d 38, 39, 231 N.Y.S.2d 642, 644 (S.Ct., Kings Co., 1962).

reputation and so escapes punishment. It would require punitive damages to be determined in inverse ratio to the reputation of the one defamed. The doctrine advanced by the defendants would nullify one of the underlying objectives of punitive damages and has consistently been rejected by New York and federal authorities. . . .

"Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit."

In Toomey v. Farley, 2 N.Y.2d 71, 83, 156 N.Y.S.2d 840, 849, 138 N.E.2d 221, 228 (1956), the Court of Appeals, quoting at length from that opinion, said: "To those views we subscribe". See also Goldwater v. Ginzburg, supra, 414 F.2d at 340-341. Cf. Clark v. Variety, Inc., 189 App.Div. 462, 178 N.Y.S. 698 (1st Dept. 1919); Cherno v. Bank of Babylon, 54 Misc.2d 277, 281, 282 N.Y.S.2d 114, 119, affd. on opin. below, 29 A.D.2d 767, 288 N.Y.S.2d 862 (2d Dept. 1968).*

Inasmuch as even appellant acknowledges that the purpose of punitive damages is "to deter and to punish", the arguments of appellant and amicus for the "ratio test" are palpably specious and illogical. Obviously the measure of effective admonition and the prevention of a repetition of defendant's conduct is not to be determined by the amount of the actual damages caused by a culpable act; e.g., should exemplary damages of \$15 be assessed against a reckless hunter who shoots into a crowd of people at a picnic but fortunately the bullet only goes through the peak of one person's hat?

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*In Reynolds an award of \$1 compensatory and \$175,000 punitive was upheld; in Goldwater, \$1 compensatory and \$75,000 punitive; Toomey, six cents compensatory damages and \$5,000 punitive damages for one plaintiff (\$5,000 compensatory and \$5,000 punitive to another). In Hess v. News Syndicate, Inc., 267 App.Div. 886, 47 N.Y.S.2d 584 (1st Dept. 1944), the Court, reversing without comment 180 Misc. 298, 42 N.Y.S.2d 297 (1943), reinstated a verdict of six cents actual damages with \$12,000 punitive damages. See also Wetherbee v. United Insurance Co. of America, supra, upholding on appeal the trial court's refusal to set aside a verdict of \$200,000 punitive damages where the plaintiff had been awarded only \$1,050 actual damages.

Despite the welter of cases cited and quoted by appellant and amicus, there are no novel constitutional questions involved in the case at bar. The "chilling restraint" quotation from Afro-American Publishing Co. v. Jaffe, supra, 366 F.2d at 662, by Doubleday (AppB 47) introducing its argument on "excessiveness", was mere dictum.* The Court there remanded the matter of punitive damages solely because the trial court had not taken into account the requirement that punitive damages be dependent upon a finding of "either actual malice or wanton conduct" (ibid., 661). Indeed, the Court suggested (663) that it would approve the same amount if the District Court concluded that any award for exemplary damages be proper.

In Curtis Publishing Co. v. Butts, supra, 388 U.S. at 159, upholding a judgment of \$400,000 in punitive damages, in addition to \$60,000 actual damages, Mr. Justice Harlan said:

"Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case. . . , but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning."

In short, all of the generalities and broad propositions posed in the briefs of appellant and amicus appear meaningless when considered in reference to the actual facts in the particular case now on appeal. We respectfully submit that the evidence clearly justified the verdict.

POINT VII.

NO DISCUSSION IS NECESSARY REGARDING THE PRE-TRIAL ORDERS INCLUDED IN THE APPEAL.

While technically Doubleday has also appealed from various pre-trial orders such as its motion to dismiss the second cause of action (invasion of privacy)

*See also the comment in Virgil v. Time, Inc., 527 F.2d supra, at 1128, fn. 8.

and its motion for summary judgment, it appears unnecessary for us to specifically deal with those undiscussed items because:

1. Those motions are in effect encompassed by the post-trial motion for judgment n.o.v., etc. Clearly, if the Court affirms the judgment and the order denying Doubleday's motion to set aside the verdict, etc., such rulings must per force dispose of the substance of matters raised in those preliminary motions. The crucial documentary evidence from Doubleday's own files were before the Court when it denied the motion for summary judgment (see 111-117a), and the invasion of privacy issue is identical with that raised in the motion for judgment n.o.v. (see Hotchner and Doubleday Points III).

2. The earlier motion to dismiss the second cause of action is the only pre-trial motion mentioned by Doubleday, and the brief of amicus does not deal with any. Ordinarily an issue not dealt with in the appellant's brief will not be considered and is deemed waived. United States v. White, 454 F.2d 435, 439 (7th Cir. 1971), cert. den. 406 U.S. 962 (1972). Nor can they be raised in the reply brief. Mississippi River Corp. v. Federal Trade Commission, 454 F.2d 1083, 1093 (8th Cir. 1972).

CONCLUSION

The judgments and orders appealed from should be affirmed in all respects, with costs to appellee.

January 4, 1977

Respectfully submitted,
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SIMON J. HAUSER,
Of Counsel.

Schedule of the Book's Other False Statements and Fabrications

<u>Item</u>	<u>Page of Book</u>	<u>Statements</u>	<u>Testimony of Witnesses</u>
A	1	Hemingway had killed himself while cleaning rifle	Mary Hemingway ("M.Hemingway"): death due to shotgun (562t)
B	1	"Could it have been one of the beautiful shotguns he brought back from Spain on last trip".	M. Hemingway: he brought back no shotguns on his last trip in 1960 (563t)
C	1	"An absolutely dependable automatic rifle"	M.Hemingway: he was foe of automatic rifles. (563t)
D	2	Hemingway said to Puche of his son, Patrick, "He's a bit thick between the ears".	M.Hemingway: Patrick <u>cum laude</u> graduate from Harvard, very bright, knew 11 African dialects (564t)
E	4	"Hemingway's great booming laugh"	M.Hemingway: not a great, booming laugh (565t)
F	4	Hemingway "dive naked into an ice-cold river"	M.Hemingway: never saw him dive naked (556-7t)
G	82	"last remaining traces of a certain ambition of Ernesto's, to be at once a prince and a rogue"	Hotchner: Ernest never described such an ambition (143t)
H	84	Photograph of Hemingway at bedside of almost naked gored bullfighter, Ordonez, had "caused the most vulgar and vicious talk, all over Spain and elsewhere".	M.Hemingway: never heard any such talk (557t).
I	84	"Most people were quite willing to believe that in Hemingway's very exclusive circle of intimates the most shameless vices were tolerated".	M.Hemingway: a false statement (558t).
J	139	"I'd seen him [shoot cigarettes from Ordonez's mouth] several times in a row"	M.Hemingway: Puche not at Hemingway's 60th birthday party and could not have seen this (559t).

<u>Item</u>	<u>Page of Book</u>	<u>Statements</u>	<u>Testimony of Witnesses</u>
K	161	As to chorus of girl students Hemingway said "Where do you suppose their maidenheads went?"	Hotchner: absolutely alien to his character and nature-- his speech one of politeness (290a).
L	177	"We had agreed to meet in the Plaza del Castillo [Pamplona] and I had no trouble finding him".	Gaceta article*: "Ernesto, where are you *** I can't find you." "My first visits to the hotels did not bear fruit" "[The next day] it was sometime in the afternoon *** when he appeared in City Hall Square".
M	198	"and 'Freckles' said in his halting Spanish".	Hotchner: never met or spoke to Puche and spoke no Spanish (286a).
N	179	"Ernesto appeared on the surface to be frivolous and rowdy *** but underneath he was terribly depressed and bored *** to conceal an inner loneliness".	M. Hemingway: not rowdy. Hemingway not terribly depressed and bored in 1959 and didn't have an inner loneliness (566-7t).
O	180	Ernesto going from table to table in cafe, picking up drinks and pouring them all together and then drinking the concoction.	M. Hemingway: never saw him do it (567t).
P	181	Ernesto "***was sometimes a bit tightfisted with his money" [Cf. p. 316 of Book "He spent money like water"; p. 4 of Book, he was "prodigal with his money".]	M. Hemingway: he was one of the most generous men in the world; constantly picked up check at dinner (560t).

*Written by Puche for a Spanish magazine, dated August 8, 1959 less than a month after Pamplona, Exh 34, translation by Purczynski, Exh 35.

<u>Item</u>	<u>Page of Book</u>		
Q	182	Hotchner "had entirely the wrong idea about one thing: he was quite certain that the fiesta would end in a great, collective orgy".	Hotchner: never spoke to Puche and had no common language.
R	183	"Ernesto had started making advances to the "kidnap victims" and the "Irish girl" more or less as a joke but was quite willing to go further".	Schoonmaker: Couldn't be further from the truth (337a). V. Hemingway: No advances toward any of the three (462t).
S	183	"as when Mary broke her foot".	M.Hemingway: broke her toe (551t).
T	184	"The Irish girl looked as though she'd been starving to death when she arrived".	M.Hemingway: She didn't "arrive", she came with us from Madrid. (575t).
U	184	"The Irish girl *** kept stroking herself and constantly acted *** like a bitch in heat ***[she] was to lose a great many things at the fiesta ***"	M.Hemingway: did not see any such conduct. She was a very well-brought-up girl (576t).
V	184	The two ["kidnap victims"] were cold, calculating creatures".	M.Hemingway: They were charming, cheerful girls (567t).
W	185	"Juanito Quintana turned up just then and I noticed that Hotchner took an <u>instant</u> dislike to him"(emphasis added). "***and the two of them [Hemingway and Quintana] immediately began talking bull-fighting".	M.Hemingway: Hotchner had met Quintana in 1954 (577t). Her husband and Quintana discussed hotel rooms and tickets [which Quintana had failed to get].
X	Picture 30 (after p.244)	Hemingway with the two "kidnap victims"	Schoonmaker: Picture is not of the kidnap victims (338a)
Y	192	"We could also hear skyrockets going off and church bells ringing. The fiesta had really gotten under way now ***'I'm so happy you could come', Ernesto said to me".	Gaceta article states that when the skyrockets were going off and the fiesta had had gotten under way "Ernesto was not there", (Exh. 35, p.5) and it was not until some time next afternoon, about dusk, that Puche found him.

<u>Item</u>	<u>Page of Book</u>	<u>Statements</u>	<u>Testimony of Witnesses</u>
Z	193-4	"Ernesto was positively drooling as he sat there watching the gestures and posturings of that youngster [Ordonez]".	M.Hemingway: he was not drooling (568t).
AA	202	[Ernesto] "running around, making phone calls, rushing back and forth *** going into ecstasies, vomiting".	M.Hemingway: he never vomited; he disliked making phone calls and got others to make them for him. (561t).
BB	208	the "kidnap victims" were talking about Antonio, calling him in their hesitant, faulty Spanish***".	Schoonmaker: I spoke no Spanish and never spoke to Puche (333a).
CC	210	"Ernesto's presence in Spain--whether at the San Fermin fiesta *** at a hunting preserve, in the Prado Museum or in a gas station--did not always cause people to burst into applause. ***He was often greeted by insulting remarks and gibes".	M.Hemingway: never heard him greeted by insulting remarks and gibes. Puche never with Hemingway at hunting preserve, at Prado or at gas station (572t).
DD	Pictüre 31, cpp.p. 225	Hemingway with pair of parakeets bought for Valerie's enjoyment.	Valerie Hemingway: He didn't buy me any parakeets. (464t).
EE	p.277-286	Description of visits and conversations with Hemingway in Prado museum	M.Hemingway: Puche never with Hemingway at Prado. (572t).
FF	316	"When I saw him arrive with so much baggage *** I wondered whether he might not be coming to settle down permanently in Spain".	M.Hemingway: Puche not there when we arrived in Spain (569t).
GG	317	"When he had first arrived in Spain he had been *** eagerly anticipating getting to work on his great piéce of reporting the <u>Life</u> articles "	M.Hemingway: not true. He got a cable from <u>Life</u> in Malaga, after he arrived, proposing the articles (570t).
HH	317	"I think the fact that Mary was with him on this last trip [in 1960] ***"	M.Hemingway: I did not go to Spain with him in 1960 (570t).

<u>Item</u>	<u>Page of Book</u>	<u>Statements</u>	<u>Testimony of Witnesses</u>
II	318	"Despite Hotchner's warmly enthusiastic predictions that <u>The Dangerous Summer</u> was going to be a rousing success ***"	Hotchner: never met or spoke to Puche and spoke no Spanish (286a).
JJ	320 (top of page)	conversation with Ernesto, Ordonez, Davis, Hotchner and Puche	See prior Item:
KK	322	Conversations between Mary Hemingway and Puche in Madrid in 1960	Mary not in Spain in 1960 (570t). Puche not there either (Davis, 272t).
LL	324	During his [Hemingway's] last stay in Madrid [1960] ** And it was at this point that Mary began to be seriously concerned about him, though she never said a word.	Likewise a fabrication. See prior Item
MM	346	[Mary Hemingway] "the doctor had to put her entire leg in a light case ***and [she] was in terrible pain	M. Hemingway: some pain but not a great deal (551t)
NN	346	"I was surprised to see that Ernesto worried constantly about Antonio's [Ordonez] little scratch ***"	Schoonmaker: wound from a bull which required a surgical drain (338a)
OO	347	Hemingway "would become *** depressed *** would often appear quite drunk".	M. Hemingway: not true (573-4t).
PP	348	"Ernesto would spirit all of us off to the banks of the Irati <u>after</u> lunch" (emphasis added)	Davis: always had lunch at picnic at Irati River because I brought the picnic lunches. Puche never there (314a).
QQ	351	[Hemingway to Puche] "She [the Irish girl, Valerie] might like it if you tried to make out with her."	Valerie Hemingway: conversation sounds false to her. Hemingway would use word beginning with "F" and not "make out" (466-7t). M. Hemingway: not in character for her husband to speak that way (574t).
RR	351	"Ernesto had tended recently to be more and more coarse and crude".	M. Hemingway: never heard him be coarse or crude (575t).

<u>Item</u>	<u>Page of Book</u>	<u>Statements</u>	<u>Testimony of Witnesses</u>
SS	356	Ernesto having "kidnap victims" scratch his front and back	Schoonmaker: never happened (338a)
TT	360- 361	Last evening in Pamplona-- conversations, dinner and after dinner	Puche never had dinner with Hemingway and his group. Hotchner (299-300a); Davis (314a)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

E. EPSTEIN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 227 E. MOSHOLU PKWY
BRONX, N.Y.

That on the 6 day of JANUARY, 1977,
deponent personally served the within BRIEF OF
PLAINTIFF-APPELLEE
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

SATTERLEE & STEPHENS
ATTORNEYS FOR DEFENDANT APPELLANT
DOUBLEDAY & COMPANY INC.
277 PARK AVE
NEW YORK, N.Y. 10017

Sworn to before me this

6 day of January, 1977

E. Epstein

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 01-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALBERT HILL, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2 EAST 127th ST
NEW YORK, N.Y.

That on the 6 day of JANUARY, 1977,
deponent personally served the within BRIEF OF
PLAINTIFF - APPELLEE
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

HARRY H. KAUFMAN, ESQ.
ATTORNEY FOR ASSOCIATION OF AMERICAN PUBLISHERS, INC.
AMICUS CURIAE
1 PARK AVE.
NEW YORK, N.Y. 10016

Sworn to before me this

6 day of January, 1977

Albert Hill

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 20, 1978 77